

THE INDIAN LAW

CALCUTTA SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT CALCUTTA AND BY THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM
THAT COURT AND FROM ALL OTHER COURTS IN BRITISH
INDIA NOT SUBJECT TO ANY HIGH COURT.

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CORRIGENDA.

Page 71, line 2, in head-note, *for* "1880," *read* "1879."

„ 153, line 6 from foot, *for* "yet object," *read* "yet not object."

„ „ line 2 from foot, *for* "does not affect," *read* "disturbs."

„ 167, line 16 from top, *for* "legal," *read* "illegal."

„ 293, *for* "*Rooke v. Peuri Lall Coal Co.*," *read* "*Peuri Lall & Co. v. Rooke.*"



„ 336, line 9 from top, *for* "decemed," *read* "decreed."

„ 747, line 13 from top, *for* "putma," *read* "futwa;" and line 3 from foot, *for* "sunori," *read* "sumni."

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THE
INDIAN LAW REPORTS,
Calcutta Series.

ORIGINAL CIVIL.

Before Mr. Justice Wilson.

IN THE MATTER OF McCORKINDALE (DECEASED).

1880
April 15.

*Attorney and Client—Attorney's Lien—Discharge by Dissolution of
Partnership—Contract Act (IX of 1872), ss. 1, 171.*

Where a firm of attorneys dissolved partnership after the death of a client, there being at that time papers and documents belonging to the client in their hands, and a debt due in respect of costs from the client to them,—

Held, that the dissolution of partnership operated as a discharge by the firm, and that the attorneys were not entitled to retain the papers and documents until their costs were paid, but were bound to hand them over to the administrator of the client.

Section 171 of the Contract Act does not give an attorney an absolute lien. Section 1 provides that nothing in the Act contained shall affect any usage or custom of trade, and, as no part of the English law is inconsistent with s. 171, cases arising in this country must be governed by the English authorities. According to those authorities, while the relation of attorney and client exists, the client may either continue to employ the attorney or change him. When he claims to do the latter, the attorney being willing to act, he cannot ask the attorney to give up papers in his possession without first satisfying the lien. The attorney has his option,—he may, if he chooses, either go on acting for his client, or cease to act; if he adopt the latter course he must give up the papers.

1880 On the death of the client his representative stands in exactly the same position with respect to the attorney as the client did.
 IN THE *In re Moss* (1) followed.
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THIS was an application on behalf of the Administrator-General of Bengal, as the administrator of the property and credits of Donald McCorkindale, deceased, for an order, that the firm of Messrs. Harriss & Co. should hand over all drafts, deeds, letters, copies, documents, and papers in their hands in reference to all matters and suits wherein the late firm of Messrs. Orr and Harriss were concerned, for and on behalf of the said Donald McCorkindale, to be held by the Administrator-General subject to their lien thereon for costs.

It appeared that the firm of Messrs. Orr and Harriss had acted as the attorneys of Mr. McCorkindale up to the 23rd January 1880, the date of his death. On the 3rd of February 1880, Messrs. Orr and Harriss dissolved partnership; and their business was carried on by a new firm under the style of 'Messrs. Harriss & Co.,' who retained possession of all Mr. McCorkindale's papers and documents. On the 19th of February, the Administrator-General took out letters of administration to the property and credits of Mr. McCorkindale. At that time a considerable sum was due to the firm for costs in respect of work done for the deceased. Messrs. Harriss & Co., on being applied to to hand over all papers relating to the affairs of the deceased to the Administrator-General, to be held by him subject to their lien, refused to do so without payment of their costs in full. The Administrator-General now applied for an order as above, stating that it was impossible for him to protect the estate of the deceased, or to act in various suits then pending and relating to the estate, unless the papers were handed over.

Mr. Branson for the Administrator-General.—By dissolving partnership the firm of Orr and Harriss discharged the relation of attorney and client existing between them and the representative of Mr. McCorkindale. Messrs. Harriss & Co. contend that the firm of Orr and Harriss were discharged upon the death of Mr. McCorkindale, and that the lien arose then. If

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the client voluntarily discharges his attorney, the lien arises at once. But the death of the client is not a discharge. The act of the attorneys themselves operated as a discharge, and they are not entitled to hold these papers as against the Administrator-General. The case is like *In re Moss* (1), where it was held, that a dissolution of partnership operated as a discharge. The rule was laid down by Wigram, V. C., in *Griffiths v. Griffiths* (2) as follows:—"If a client discharges his solicitor, the Court never takes the papers from the solicitor unless upon payment of his bill. If, on the other hand, the solicitor discharges himself, then, according to the decision in *Heslop v. Metcalfe* (3), the Court will compel him to give over the papers to the new solicitor, saving his lien upon them." The discharge here was by the attorneys' own act, and the Administrator-General is entitled to have the papers delivered up to him subject to Messrs. Harriss & Co.'s lien.

Mr. T. A. Aparcar for Messrs. Harriss & Co.—The death of Mr. McCorkindale discharged the firm of Orr and Harriss, and their lien arose then. But even if it did not, the lien is not done away with. Section 171 of the Contract Act provides, that attorneys of a High Court may, in the absence of a contract to the contrary, retain as a security, for a general balance of account, any goods bailed to them. The word "goods" can only, in the case of an attorney, mean books, papers, and documents belonging to his client in his possession. The Act does not contain any provision for discharging the lien. Cunningham, in his note to this section, says,—“a solicitor who discharges himself has not this right (of lien) under English law. It is not, however, clear, from the wording of the present section, that an attorney who had discharged himself would not have this right.” [WILSON, J.—Does not the case come under s. 1, which says, that “nothing herein shall affect any usage or custom?”] The death of the client discharged the attorney. There was no one then to continue the employment. [WILSON, J.—Is not the administrator in the position of the client? Has he not the right to continue the employment or not

(1) L. R., 2 Eq., 346. (2) 2 Hare, 587, at p. 590. (3) 3 My. and Cr., 183.

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as he chooses? If the attorney is willing to act, and the client discharges him, the lien arises. Here the Administrator-General might have continued the employment.] The discharge was complete upon the death of Mr. McCorkindale. The option which the Administrator-General might have of continuing the employment does not get rid of the fact that, at the time of the death of the client, there was no one who could so continue it. There was no one in that position until the Administrator-General took out letters of administration. It would have been necessary for him to give the firm a fresh warrant if he had wished to continue the employment, and that shows that the death of the client operated as a discharge. Our lien is subsisting, and we should not be required to give up the papers; in many cases giving up the papers virtually destroys the lien. The case of *In re Moss* (1) is really an authority in my favour. Even if the client is embarrassed by the lien, that in no way affects his rights—*In re Faithful* (2). In that case it was held that where a solicitor has been discharged by his client, he will not be ordered to produce or deliver up to the client the papers on which he claims the lien, although his not doing so will embarrass the client in prosecuting or defending his claims. The case of *Chalie v. Gwynne* (3) shows that the attorney's retainer is discharged at the time of the client's death. [WILSON, J.—All that that case decides is, that an attorney must appear for a party to the cause, and that a dead man is not a party.] There is a contract between the attorney and client which is put an end to by the death of the client, and the lien arises as soon as the contract is determined.

WILSON, J.—I don't think there is any reason for doubt in this application. The facts are simple. Mr. McCorkindale employed the firm of Messrs. Orr and Harriss as his attorneys. On the 23rd of January last he died, leaving a will, whereby he appointed Messrs. James Anderson and William Palam his executors. These gentlemen having renounced probate of the will, the Administrator-General, on the 19th of February last, obtained letters of administration to the property and credits of Mr. McCorkindale. On the 3rd of February the firm of Messrs.

(1) L. R., 2 Eq., 345. (2) L. R., 6 Eq., 325. (3) 9 Beav., 319.

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Orr and Harriss dissolved partnership, and the business was carried on under the style of 'Messrs. Harriss & Co.' They retained possession of Mr. McCorkindale's papers. Repeated demands were then made by the Administrator-General to the present firm of Messrs. Harriss & Co., to deliver over to him all drafts, deeds, letters, documents, and papers which were then in their hands in reference to all matters and suits wherein the late firm of Messrs. Orr and Harriss were concerned on behalf of Mr. McCorkindale, the Administrator-General holding these documents subject to their lien thereon for costs. Messrs. Harriss & Co. refused to deliver up the papers without payment of their costs in full. These are the important facts. The question now is, whether the attorneys are entitled to say "we will not part with the papers until our debt is paid," or whether the Administrator-General is entitled to say "Give up the papers to my attorneys, and I will undertake to take them subject to your lien for costs." Mr. Apar says,—Section 171 of the Contract Act gives the attorney an absolute lien. I don't think so, because the first section of the Act says,—“Nothing herein contained shall affect any usage or custom of trade.” It seems to me that no part of the English law is inconsistent with s. 171 of the Contract Act, and, therefore, this case must be governed by the English authorities. The clear principle on which this case rests is, that while the relation of attorney and client exists, the client may either continue to employ the attorney, or change him. When he claims to do that, the attorney being willing to act, he cannot ask the attorney to give up the papers without first satisfying the lien. The attorney has his option, he may if he chooses go on acting for his client, or if he chooses to cease to act, then he must give up the papers. There is no doubt how this case would have been decided had Mr. McCorkindale been still alive. It is clear that the attorneys would have, by their own act, put it out of their power to continue to act for him. The only circumstance which distinguishes that from the present case is, that the client himself dies. But does this really alter the case? I think not. The case is analogous to the case of *In re Moss* (1). The Master of

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the Rolls there said :—" I hold it to be settled by the authorities, that if a firm of solicitors becomes bankrupt, the bankruptcy is itself a discharge of the clients who employ them : but I also hold this, which I think is equally clear, that if the client becomes bankrupt, and the assignees do not employ the firm of solicitors, that is a discharge by the client of the solicitors." If the assignee had refused to act, the termination of the employment would be the act of the attorney. It appears to me that, after the Administrator-General had taken out letters of administration, he was entitled to the same freedom of action as the client had. He was at liberty to change the attorneys or continue employing them. The only thing which prevented that option being exercised in this case was, that the attorneys had, by their own act, put it out of the power of the Administrator-General to employ them. The case is the same as if the original client were alive. I think the order must, therefore, be made, and with costs.

Application granted.

Attorneys for the Administrator-General : Messrs. *Carruthers and Jennings.*

Attorney for Messrs. Harriss & Co. : Mr. *Simmons.*

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

1880

May 7.

MASAOOLLAH KHAN (DEFENDANT) v. RAM LALL AGURWALLAH
(PLAINTIFF).*

Jurisdiction of Subordinate Judge—Joinder of Causes of Action—Civil Procedure Code (Act VII of 1859), ss. 6, 8 ; (Act X of 1877), s. 15—Bengal Civil Courts Act (VI of 1871), s. 19.

Section 6 of Act VIII of 1859 (corresponding with s. 15 of Act X of 1877), which provides that "every suit shall be instituted in the Court of the

* Appeal from Appellate Decree, No. 1432 of 1879, against the decree of A. T. Maclean, Esq., Judge of the 24-Pargannas, dated the 8th January 1879, affirming the decree of Baboo Krishna Mohun Mukerjee, Second Subordinate Judge of that district, dated the 6th February 1878.

lowest grade competent to try it," does not affect the jurisdiction of a Subordinate Judge to try a suit wherein several causes of action are joined, the cumulative value of which is over Rs. 1,000; notwithstanding that, if separate suits had been brought on these several causes, such suits must have been instituted in the Court of the Munsif.

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THIS was a suit brought on three separate mortgage-deeds, the first, dated the 23rd April 1874, for Rs. 1,700; the second, dated the 1st August of the same year, for Rs. 950; the third, dated the 4th October following, for Rs. 400. The whole sum claimed, together with interest on these mortgages, amounted to the sum of Rs. 4,753-12-15. The case was instituted in the Court of the Subordinate Judge, who, on the merits, gave the plaintiff a decree; and this judgment was upheld by the lower Appellate Court. The defendant appealed to the High Court, and there, for the first time, took the objection to the plaintiff's suit, on the ground that the Court of first instance had no jurisdiction to try the case.

Mr. *Twidale* for the appellant.—This suit was instituted at a time when the old Code of Civil Procedure was in force. Under that Code, several causes of action cannot be joined in the same suit, unless each was cognizable by the same Court. Here two of the claims, being each in value less than Rs. 1,000, ought, under s. 6 of that Code, to have been instituted in the Munsif's Court, that being the Court of the lowest grade competent to try them. In this suit, therefore, there has been a misjoinder of claim, and the Subordinate Judge had no jurisdiction to try it.

Baboo *Shyam Lall Mitter* and *Mohiny Chunder Mitter* for the respondent.

The judgment of the Court (JACKSON and TOTTENHAM, JJ.) was delivered by

JACKSON, J.—It is clear that there is no ground of special appeal in this case. The one point which was raised before us, but which was not raised in the lower Appellate Court, was the question of jurisdiction. It is suggested that this suit was not properly framed, inasmuch as the plaintiff joined together three different causes of action, which he had against the defendant,

1880 two of which were valued at less than Rs. 1,000. As to these
 MASAOOLLAH KHAN v. RAM LALL AGURWALLAH. two, it is contended that the Subordinate Judge had no jurisdiction. Now, the old Code of Civil Procedure, under which this suit was commenced, authorized a plaintiff to join causes of action against the same parties which were cognizable by the same Court. It is contended that these two suits being below Rs. 1,000 were not cognizable by the Subordinate Judge under Act VI of 1871, but it is clear that they were, because s. 19 of that Act gives the Subordinate Judge jurisdiction over all cases without reference to the value, subject only to the condition contained in s. 6 of the Code of Civil Procedure. The effect of that would be, that, if suits had been brought under these two bonds separately, they would, under s. 6, have to be filed in the Court of the Munsif, but they were cognizable by the Subordinate Judge. Therefore, the plaintiff was quite warranted in including them in one suit, and the whole cause of action united being over Rs. 1,000 was rightly tried by the Subordinate Judge.

The appeal is dismissed with costs.

Appeal dismissed.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, Mr. Justice Morris, Mr. Justice Miller, and Mr. Justice Tottenham.

1880 CHUNDER SIKHUR BUNDOPADHYA AND OTHERS (DEFENDANTS) v.
 June 8. OBHOY CHURN BAGCHI (PLAINTIFF).*

Limitation—Suit to recover Possession of Land taken by Municipal Commissioners—Beng. Act III of 1864, s. 87.

Section 87 of Beng. Act III of 1864 is applicable only in those cases where the plaintiff claims damages or compensation for some wrongful act committed by the Commissioners or their officers, in the exercise, or honestly supposed exercise, of their statutory powers.

* Full Bench Reference in Appeal from Appellate Decrees, Nos. 348, 349, and 350 of 1879, made by Mr. Justice Jackson and Mr. Justice Tottenham, dated the 22nd April 1880, against the decree of P. Dickens, Esq., Judge of Nuddea, dated the 29th of November 1878, reversing the decree of Baboo Anundo Coomar Surbudhikari, Munsif of Ranaghat, dated the 6th of April 1876.

The notice in the earlier part of the section is meant to give the defendant an opportunity of making some pecuniary amends for the wrong, without incurring the cost of litigation.

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THIS was a suit to recover possession of certain land taken by the Santipore Municipality. The plaintiff stated that he was dispossessed from the land on the 20th Aughran 1281 (5th December 1874) and that he, on the 8th Pous in the same year (22nd December), served a notice on the Municipality asking for redress, but that the Municipality did not grant him any redress within the period of one month, and that his cause of action then rose. The defendants contended, that as they had been in possession of the land for more than three months before the date of the accrual of the cause of action, the suit was barred by the special law of limitation under Beng. Act III of 1864.

The Judge of Nuddea, reversing the decision of the Munsif, gave the plaintiff a decree. The defendants appealed to the High Court.

The learned Judges, before whom the appeal was heard (Jackson and Tottenham, JJ.) referred the case for the opinion of a Full Bench in the following terms:—

“The question arises in this case whether the suit, which is not brought for the purpose of recovering damages on account of a wrong done, but to recover possession of a specific piece of land taken by the Municipal Commissioners of Santipore, is barred under s. 87, Beng. Act III of 1864, now repealed, by reason of the suit not having been commenced within three months next after the accrual of the cause of action. In a case very similar, *Poorno Chunder Roy v. Balfour* (1), before Bayley and Phear, JJ., the former learned Judge was of opinion that the special rule of limitation applied. Phear, J., questioned this, but concurred in dismissing the suit, on other grounds.

“In *Price v. Khilat Chandru Ghose* (2) Lóch and Hobhouse, JJ., held the section not to apply on grounds which appear open to observation; and in *The Municipal Committee of Moradabad v. Chatri Singh* (3) the High Court of the North-Western Provinces adopted the view of Phear, J.

(1) 9 W. R., 535. (2) 5 B. L. R., App. 50. (3) I. L. R., 1 All, 269.

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"There is a case, however—*Abhayanath Bose v. The Chairman of the Municipal Committee of Kishnaghur* (1)—where Norman, J., rather broadly laid it down, that three months' notice was necessary, where the plaintiff sued to restrain the Commissioners from interfering with a road which he claimed as his private road.

"There is thus some conflict of decision; and although the inclination of our own opinion is decidedly in favour of the view taken by Phear, J., as the point is of considerable importance, we think it right to refer the matter to a Full Bench."

Baboo Mohiny Mohun Roy and Baboo Saroda Prosonno Roy for the appellants.

Baboo Ishen Chunder Chuckerbutty for the respondent.

The judgment of the Full Bench was delivered by

GARTH, C. J.—As the relief which has been decreed in these suits is for the specific recovery of land, irrespective of any damage for the plaintiff's dispossession, we consider that the 87th section of Beng. Act III of 1864 does not apply.

That section, as it seems to us, is applicable only in those cases where the plaintiff claims damages or compensation for some wrongful act committed by the Commissioners or their officers, in the exercise, or the honestly supposed exercise, of their statutory powers.

The notice in the earlier part of the section is meant to give the defendant the opportunity of making some pecuniary amends for the wrong, without incurring the cost of litigation.

We think that it could hardly have been the intention of the legislature to allow the Commissioners (even by mistake) to appropriate the lands of private persons without paying for them, and to hold those lands for ever as against the true owners, unless the latter should happen to be sufficiently watchful to discover the aggression in time to take steps to protect their property within so short a period as two months.

The appeals will therefore be dismissed with costs, including the costs of this reference.

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

IN THE MATTER OF THE PETITION OF MOHUN DASS v. LUTCHMUN
DASS.*

1880
Feby. 9.

*Revocation of Probate—Removal of Mohunt claiming under a Will—
Succession Act (X of 1865), s. 234.*

By his will the mohunt of an *akra*, or religious endowment, appointed A to be the *malik* of the properties comprised in the endowment, and to receive the dues and pay the debts, and to do everything necessary connected therewith; and provided that, if any act was done prejudicial to any of those purposes or to any property set apart therefor, or contrary to the Hindu practice and religion or usages, the property should vest in such disciple of his who should be competent and virtuous. A obtained probate of the will, and entered upon the properties mentioned therein.

Held, that the Court had not power, under s. 234 of the Succession Act, to revoke the probate upon the ground that A had, since he took charge of the office, taken to an immoral course of conduct, and in consequence had been excluded from the community of *mohunts*.

The proper course to take for depriving such a person of his office would be to bring a suit under the Religious Endowment Act, or any other suit, for a declaration that he had disqualified himself, and if in that suit a decree was obtained and duly certified to the Court which granted probate, that Court would, no doubt, direct the revocation of the probate.

IN this case one Ramdass, the mohunt, or trustee and guardian, of an *akra*, or religious endowment, at Devipore, by his will dated the 28th December 1871, appointed Lutchmun Dass, his favorite *chela*, or disciple, to be, after his own death, his successor in the mohuntship, and to be *malik*, or proprietor, of the moveable and immoveable properties comprised in the religious endowment, and to receive the dues and pay the debts, and to do everything necessary connected therewith. The will also contained a provision, which was as follows:—"If, after

* Appeal from Original Decree, No. 271 of 1878, against the decree of A. J. R. Bainbridge, Esq., Judge of Moorshedabad, dated the 17th September 1878.

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my death, any act be done which is prejudicial to any of the aforesaid purposes, or to any property set apart for the purpose aforesaid, or contrary to our practice and religion, or to the usage which has prevailed amongst us from generation to generation, then the property shall vest in that disciple of mine who shall be competent and virtuous."

Ramdass died on the same day that he executed his will. Shortly after his death, Lutchmun Dass applied for and obtained a certificate under Act XXVII of 1860, and assumed, without opposition, the position of *mohunt* of the *akra*, and entered into possession of the properties appurtenant to it. Some five or six years afterwards disputes and disagreements arose between Lutchmun Dass and the *mohunt* of a neighbouring *akra*, and charges were made against Lutchmun Dass of immorality and malversation of property belonging to the religious endowment.

On the 11th July 1878 Lutchmun Dass, with the object, apparently, of strengthening or securing his position, applied under the Hindu Wills Act (XXI of 1870) for probate of the will of Ramdass. On the 23rd of July 1878, a caveat was filed by the objector Mohun Dass.

On the 6th of August 1878, probate of Ramdass's will was granted by the Judge of Moorshedabad to Lutchmun Dass. On the same day, Mohun Dass filed a petition, asserting that Lutchmun Dass, since his accession to the *mohuntship*, had been guilty of immorality and malversation, in consequence of which he had been excluded from communion with all other *mohunts*, and had rendered himself incapable of retaining the office of *mohunt*, and praying that the application of Lutchmun Dass should be refused, and that probate of the will of Ramdass should be granted to him, Mohun Dass, as the second and now duly virtuous and competent disciple of Ramdass, as the person designated to succeed him in the *mohuntship*.

Probate having been already granted to Lutchmun Dass, Mohun Dass, on the 20th August 1878, filed the present petition under s. 234 of the Succession Act (X of 1865), reiterating the same charges against Lutchmun Dass, and praying that the probate granted to him should be annulled or

revoked, and that he should be called upon to account for his administration of the religious endowment.

The lower Court dismissed the application without going into the merits, on the ground that s. 234 did not apply.

From this order Mohun Dass appealed to the High Court.

Baboo *Gopal Lall Mitter* and Baboo *Guru Dass Banerjee* for the appellant.

Baboo *Soorendronath Muttylall* for the respondent.

The judgment of the Court (JACKSON and TOTTENHAM, JJ.) was delivered by

JACKSON, J.—The petitioner, who is the appellant before us, moved the Judge of the District of Moorshedabad to revoke the probate of a will under which the respondent had been designated as mohunt at the head of a certain religious institution. It was alleged that this mohunt had, since he took charge of the office, taken to a certain course of conduct whereby he has tarnished his name, and in consequence whereof he has been excluded from the community of the mohunts. The Judge considered that this was not a case in which the provisions of s. 234 of the Indian Succession Act authorized him to revoke or annul the grant of probate; and the petitioner, being dissatisfied with this decision, has appealed to this Court, and before us it is contended that the section referred to does apply to such a case, and that the proof of that is to be found in illustration (h) attached to that section. Illustration (h) refers to the case of a “person to whom probate was, or letters of administration were, granted, and who has subsequently become of unsound mind;” and it is argued that as the Court is entitled so to act in the case of a person mentally disqualified, so it is also entitled to act in the case of persons who are proved to be morally disqualified.

It appears to us that this contention is founded upon an entire mistake, and there is a considerable difference between the case of a person contemplated in the illustration and that of a person against whom the present suit is directed. Illustration (h) has reference to the case of an executor who is

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acting under a probate and whose lunacy subsequently of course disables him from acting under the will, that lunacy being established by a regular enquiry under the direction of the Court under the Act relating to that subject. The respondent now before us is not an executor. He obtained probate of the will of the late mohunt, and under the operation of that will is now at the head of the institution, and until any just cause for revocation of the grant of probate is made out under the law, he cannot be removed. The proper course, as it seems to me, for depriving the respondent of the office, would be to bring a suit under the Religious Endowment Act, or any other suit for a declaration that he has disqualified himself, and if in that suit a decree is obtained and duly certified to the Court which granted probate, that Court, no doubt, would direct the revocation of the probate. The present appeal will be dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Pontifex and Mr. Justice McDonell.

1880
April 22.

THE EMPRESS v. KALA CHAND DASS AND OTHERS. *

Criminal Procedure Code (Act X of 1872), ss. 505, 506—Deposit of Cash in lieu of Security Bond for Good Behaviour.

The powers given by ss. 505 and 506 of Act X of 1872 should be exercised with extreme discretion; the former of these sections is not intended to apply to persons of "by no means a reputable character."

An order requiring persons to deposit cash in lieu of entering into a bond as security for their future good behaviour is bad in law.

THIS was a reference under s. 296 of Act X of 1872 made to the High Court by J. Smith, Esq., the Sessions Judge of Burrisal.

The accused persons were charged under s. 505 of the Criminal Procedure Code with being persons of notoriously bad liveli-

* Criminal References, Nos. 44, 45, and 47 of 1879, by J. Smith, Esq., Sessions Judge of Burrisal, dated 15th March 1880, on an order passed by the District Magistrate of that district.

hood, and the Magistrate of the District, after holding a local enquiry, at which he examined witnesses for the prosecution and defence, found the charge established, and passed the following order :—“ That the prisoners Kala Chand, Ram Sagar, Nobin Holdar, Ram Kumar Doss, Poddo Lochun, Raj Coomar Deb find two sureties in Rs. 500 each for their good behaviour for one year, under s. 505 of the Criminal Procedure Code. They are also required to furnish their own recognizances,—the amount to be deposited in cash; Kala Chand, Ram Sagar, and Ram Kumar Deb for Rs. 1,000 each; Raj Coomar Deb and Ram Kumar Doss for Rs. 500 each; and Nobin Holdar and Poddo Lochun for Rs. 250 each. In default of compliance with this order, they will, under s. 510, undergo rigorous imprisonment for the period mentioned.”

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The Sessions Judge being of opinion that the portion of the order requiring the accused to deposit cash in lieu of a bond for good behaviour was bad in law, referred the matter to the High Court.

No one appeared for either side at the hearing.

The judgment of the Court (PONTIFEX and McDONELL, JJ.) was delivered by

PONTIFEX, J.—We agree with the Sessions Judge in this case that the order passed by the Magistrate, requiring the accused persons to deposit cash in lieu of taking a bond for good behaviour, ought to be set aside as bad.

No doubt, defendant No. 5 is, on his admission, as stated by the Magistrate, but which really is not borne out by the record, a by no means reputable character. But in my opinion s. 505 is not intended to apply to a person of such character and reputation, and the Magistrate had no jurisdiction to deal with him under that section. And, speaking generally, the order passed by the Magistrate seems to me preposterous. The seven defendants are each required to find two sureties to the amount of Rs. 500 each; three of the defendants are required to deposit in cash Rs. 1,000 each; two of them Rs. 500 each; and the remaining two Rs. 250 each, and in default to have rigorous imprisonment for one year.

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With respect to the deposit, we agree with the Judge that the order is illegal.

With respect to the sureties it is prohibitive, for it is scarcely likely that fourteen sureties in Rs. 500 each would be forthcoming in a place like Bhaokalty. My own experience in Calcutta has shown me that respectable people in Calcutta, who have to provide sureties upon grant of letters of administration, have to pay heavy sums to the sureties; and I can only suppose that it would be greatly more expensive for reputed *budmashes* to provide sureties for their good behaviour. So that it comes to this, that the requirement of two sureties to the amount of Rs. 500 each for each of the defendants will in effect be inflicting a heavy pecuniary fine upon them in a case only of suspicion and reputation.

Moreover, if these cases are to be approached in the spirit with which the present has been decided, to become surety for a *budmash* will of itself be sufficient evidence to convict the surety of being himself a *budmash*.

Surely the putting in force of these very stringent sections should be exercised only with extreme discretion. In the present case the Magistrate points out incidentally the far more proper means of prevention. In the village in question he says: "So bad indeed, a few months back, had things become, that it was considered necessary to station two constables, who still remain there. . . . The accused are well known to have been in the habit of moving about the khals at night in long canoes driven by paddles, whilst thefts were of frequent occurrence. *This of course was before the arrival of the Police, whose removal would simply be the signal for a return to the old state of things.*"

We quash the order of the Magistrate directing the defendants to deposit cash and to provide sureties, and in lieu thereof we direct the defendants Nos. 1, 2, 3, 4, 6, and 7, but not defendant No. 5, to enter into bonds for their good behaviour in the amounts which they were directed to deposit in cash. All the defendants will be immediately released from the rigorous imprisonment which, it appears, they are now undergoing for default in providing sureties and depositing cash.

Order set aside.

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Mitter.

IN THE MATTER OF THE PETITION OF HURRO SUNDARI DABIA AND
OTHERS.*

1880
May 14.

HURRO SUNDARI DABIA v. CHUNDER KANT BHUTTACHARJEE.

Will, Attestation of—Succession Act (X of 1865), s. 50—Hindu Wills Act (XXI of 1870), s. 2.

Section 50 of the Succession Act (X of 1865) clearly intends that the two attesting witnesses to a will shall sign their names *after* the testator or testatrix shall have executed the will.

Bissonath Dinda v. Doyaram Jana (1) and *Fernandez v. Alves* (2) followed.

If a testatrix admits a signature on a will to be hers before a Registrar of Assurances, and is identified before him by one of the witnesses to the signature, and both the Registrar and the identifier sign their names as witnesses to the admission made,—

Held, that such an attestation would be sufficient to satisfy s. 50 of Act X of 1865.

In the goods of Roymoney Dossee (3) followed.

THIS was an application made by Hurro Sundari Dabia and others, under Act XXI of 1870, to obtain probate of the will of one Tara Sundari Dabia, who had died on the 16th Choitro 1284 (28th March 1878), leaving her property to the petitioners.

One Chunder Kant Bhuttacharjee objected to probate being granted, on the ground that the attesting witnesses had put their signatures to the will before the testatrix had herself signed it. Chunder Kant also himself applied to the Court for a certificate to collect the debts of the deceased.

On the face of the will it appeared that the testatrix had, at the time when the will was presented for registration, admitted before the Registrar the signature on the will to be hers; that

* Appeal from Original Decree, No. 5 of 1879, against the order of H. Beveridge, Esq., the Officiating Judge of Rungpore, dated the 18th September 1878.

(1) I. L. R., 5 Calc., 738.

(2) I. L. R., 3 Bomb., 382.

(3) I. L. R., 1 Calc., 150.

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one of the attesting witnesses to the will had identified the testatrix to the Registrar; and that both the Registrar and the attesting witness who had so identified the testatrix, had placed their signatures at the bottom of the memorandum made on the will, setting forth the admission by the testatrix of her signature at the Registration office.

The Court of first instance held, that the provisions of s. 50 of the Succession Act had not been complied with, inasmuch as the attesting witnesses had signed the will before the testatrix had done so, and therefore he dismissed the petition for probate, and directed that a certificate under Act XXVII of 1860 should be granted to Chunder Kant.

From this order Hurro Sundari Dabia appealed to the High Court.

Baboo Ishur Chunder Chuckerbutty for the appellants.

Babeo Grija Sunher Mozumdar for the respondent.

The judgment of the Court (GARTH, C. J., and MITTER, J.) was delivered by

GARTH, C. J.—We think that, in this case, the Judge was quite right in holding that the attestation at the foot of the will was insufficient, because it is proved that both the witnesses signed their names before the will was signed by the testatrix. We agree with the learned Judges who decided the case of *Bissonath Dinda v. Doyaram Juna* (1), and also with the Bombay case of *Fernandez v. Alves* (2), which was cited to show that s. 50, Act X of 1865, clearly intends that the two witnesses shall sign their names *after* the testator or testatrix shall have signed his or hers.

But then there is the further point, which has been argued here, and to which the attention of the Judge does not appear to have been directed,—namely, that when the testatrix admitted before the Registrar her execution of the will, she was identified on that occasion by one of the same persons who profess to have witnessed her signature to the will. Upon her admit-

(1) I. L. R., 5 Calc., 738.

(2) I. L. R., 3 Bomb., 382.

ting before the Registrar that the signature to the will was hers, the Registrar signed his name as attesting her admission, and apparently the other witness did the same.* Now, if these persons signed their names in the presence of the testatrix as attesting her own admission that she had signed the will, we think that would be sufficient, as an attestation, to satisfy the requirements of the 50th section.

We have decided, therefore, to remand the case, in order that the Judge, by recalling the witness who has already been examined, Chunder Kishore, and also any other witnesses who were present, may satisfy himself upon this point, and determine the case accordingly.

We find that the view we now take was adopted by Mr. Justice Phear in *In the goods of Roymoney Dossee* (1).

As the appellant did not raise this contention in the Court below, and as upon the materials now before us she would not be entitled to succeed, we think that the objector should have his costs in this Court.

Both parties will be at liberty to adduce fresh evidence bearing upon the question which we direct to be tried.

Case remanded.

Before Mr. Justice Pontifex and Mr. Justice McDonell.

IN THE MATTER OF THE PETITION OF NAZIRUN.

MUHAMDEE v. NAZIRUN.*

1880

March 17.

*Guardian and Minor—Application for Certificate—Grounds for Refusal—
Right of Appeal—Act XL of 1858, s. 28:*

An application for a certificate under Act XL of 1858 (which, if successful, would, in effect, prolong the minority of an infant from eighteen to twenty-one), should not be granted when the alleged minor is admittedly on the point of attaining the age of eighteen, unless under particular circumstances, as where very great weakness of mind is proved, or where it is shown that there is some absolute necessity for making such order.

* Appeal from Order, No. 258 of 1879, against the order of J. F. Brown, Esq., Judge of Patna, dated the 15th August 1879.

(1) I. L. R., 1 Calc., 150.

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MATTER OF
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DARIA.

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Any person who, being a party to proceedings taken under Act XL of 1858, is injuriously affected by an order passed thereon, is, under s. 28 of that Act, entitled to an appeal.

THIS was an application for a certificate under Act XL of 1858, made by one Nazirun, as guardian of her son, Tabaruck Hossein. The application was opposed by one Muhamdee Begum, who was a purchaser of several properties from Tabaruck Hossein, on the ground that the applicant's son had already attained his majority. The son also appeared through a pleader and supported the opposition. It appeared from evidence adduced by the applicant that her son was under eighteen, although he would very shortly attain that age. The Judge of Patna granted the application.

From that order the objector appealed to the High Court.

Mr. *M. L. Sandel* and *Moonshee Muhomed Yusuf* for the appellant.

Mr. *C. Gregory* and *Baboo Saligram Sing* for the respondent.

The judgment of the Court (PONTIFEX and McDONELL, JJ.) was delivered by

PONTIFEX, J.—We think that this is not a case in which a certificate ought to have been granted under Act XL of 1858. The applicant in the Court below is Mussamut Nazirun, and according to her own statement, at the time she made her application, her son, Tabaruck Hossein, was within a very few months of attaining majority; and at the time when the learned Judge's order was made in August 1879, he must have been within a few days of attaining his eighteenth year.

In the Court below, Mussamut Muhamdee Begum was, either at her own instance, or by the action of the opposite party, made a party to the proceedings, and Tabaruck Hossein himself also took objection to the certificate being granted. The objector, Muhamdee Begum, claimed to hold a mukurari from the alleged infant made in the preceding March, and she would certainly be prejudiced if the certificate is allowed to stand.

We think that applications for certificates under Act XL of

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1858, the result of which would be to prolong minority from eighteen to twenty-one, ought not to be granted when the alleged minor is admittedly so near his majority of eighteen as in this case, unless under particular circumstances, as where very great weakness of mind is proved, or where it is shown that there is some absolute necessity for it. We have had the evidence read to us, and we do not think that any sufficient reason appears for the grant of certificate. We are not satisfied even that the evidence shews that the alleged infant was at the date of the judgment a minor. The Judge, it appears, was satisfied with the evidence, because the witnesses stated that Tabaruck was born some twenty-five days before his father's death. But the evidence as to the date of the father's death does not appear to be at all satisfactory. However, we do not intend to prejudge that question. If Tabaruck was an infant at the time that he executed this mukurari lease, he will not be bound thereby. The case must be determined upon its merits. We think the lower Court ought not to have granted a certificate in this case, the result of which would be to prolong the tutelage of Tabaruck for three years.

A question has been raised whether the appellant here has any *locus standi* in appealing to the Court. We think that, under s. 28 of Act XL of 1858, an appeal is clearly given to any person injured by such an order of Court. The appellant here would certainly be injured by that order, and we think that, as she was a party to the proceedings below, she is entitled to appeal. Upon her appeal we overrule the order of the Court below, and decree that the petitioner, Mussamut Nazirun, was not entitled to a certificate, which we direct must be cancelled. Under the circumstances each party will bear her own costs in this Court.

Appeal allowed.

Before Mr. Justice White and Mr. Justice Maclean.

1880 „ JOYKESHEN MOOKERJEE AND ANOTHER (TWO OF THE DEFENDANTS) v.
June 15. ATAOR ROHOMAN (PLAINTIFF).*

*Limitation—Appeal, Time for—Final Order—Review—Civil Procedure
Code (Act X of 1877), s. 206.*

Any order made upon an application for a review of judgment, except an order absolutely rejecting the application, becomes, if it in any way modifies or alters the original order, although the modification or alteration extends only to the rectification of a clerical mistake, the final order in the case; and the party aggrieved by the original decree is entitled, although the modification or alteration was made in his favor, to treat the order upon review of judgment as the final decree or order in the case, and if it was made by a Court, an appeal from which lies to the Court of a District Judge, he is entitled to prefer his appeal at any time within thirty days from its date.

When an application for a review of judgment is made upon several grounds, one of which refers only to the question of adjudication of costs, and the Court to whom the application is made holds all the other grounds to be untenable, but is of opinion that there has been a clerical mistake in that part of its order or judgment which refers to costs, it may reject the application absolutely and permit the applicant to apply, under s. 206 of the Civil Procedure Code, for a rectification of the clerical mistake; but if it does not do so, but, on the application for a review of judgment, amends the clerical mistake in its original order, the decree drawn up in conformity to this order becomes the final decree, and an appeal will lie against it if brought within the time prescribed for bringing an appeal against any other similar decree.

Baboo *Aushootosh Mookerjee* and Baboo *Biprodass Mookerjee*
for the appellants.

Moonshee *Mahomed Yusoof* and Moonshee *Serajul Islam*
for the respondent.

THE facts of this case sufficiently appear from the judgment
of the Court (WHITE and MACLEAN, JJ.), which was delivered by

WHITE, J.—This is a second appeal against a decree of the

* Appeal from Appellate Decree, No. 1240 of 1879, against the decree of C. D. Field, Esq., Judge of East Burdwan, dated the 1st of May 1879, affirming the decree of Bhooputty Roy Bahadur, Subordinate Judge of that district, dated the 3rd of February 1879.

lower Appellate Court, which rejected the appellants' appeal as being out of time.

It is not disputed that the first appeal was barred, unless a certain order which was made by the Subordinate Judge of the 3rd of February 1879 ought to be treated as the final decree in the suit. On the other hand, if it ought to be so treated, the Full Bench case of *Soudaminee Dossee v. Dheraj Mahtab Chand* (1) shows that limitation runs from the date of the order, in which case the appellants would not be barred.

This order was made under the following circumstances :—

The Subordinate Judge, on the 28th July 1878, pronounced a decree in favor of the respondent (who was the plaintiff in the first Court) in respect of a portion of his claim. The appellants, who are two of the defendants in the first Court, applied to the Subordinate Judge by petition for a review of judgment on several grounds, amongst others on the ground that they were entitled to their costs in proportion to the amount of the claim of the plaintiff which was disallowed. Notice of the application issued to the respondent. After hearing argument, the Subordinate Judge delivered a judgment, in which he allowed the petition, but only on the last ground, as to which he says: "The last ground as to the proportionate costs seems to be valid. It was a clerical mistake. No reason was given to disallow the costs, nor was there an order disallowing the costs. I allow this ground." He then made the following order: "That the decree be corrected. Defendants' proportionate costs to be paid by plaintiff. Costs to bear interest at 6 per cent. per annum from the date of the original decree. Both parties shall bear their costs respectively, as I allow this petition partly and disallow the other part."

The District Judge treats the order as one rejecting the application for a review, and therefore as giving to the appellants no fresh point of departure as regards the period of limitation. His judgment runs thus :—

"The Subordinate Judge does not say very clearly what his proceeding of the 3rd of February 1879 was intended to be; but I think it impossible, upon reading it in the light of the

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(1) B. L. R., Sup. Vol., 585; S. C., 6 W. R., Mis. Rul., 102.

1880 provisions of the Code, to regard it as anything else than an order substantially rejecting the application for a review, but allowing what he considered a clerical mistake to be amended."

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In passing this decision the Judge appears to have overlooked the fact that the Subordinate Judge expressly states that he allows the appellants' petition in part, and also that, by the order itself made upon the petition, he corrected the decree. The allowance of the petition was indeed on a minor ground, and there was no formal rehearing of the case after the allowance of the ground, but neither of these things affect the construction of the order. The application, which was one for a review, was not the less the grant of the review, because it was allowed on one ground only, and that a comparatively insignificant one. It is clear also that the decree was corrected in consequence of the petition. As the Subordinate Judge had both the parties before him, and there was nothing further to be said respecting the matter as to which correction was sought, a rehearing would have been a mere formality, and might well be dispensed with as unnecessary.

It was for this reason probably that the allowance of the petition and the amendment of the decree were embodied in the one order. It perhaps would have been more regular to have made two orders instead of one, but the omission to do so would not affect the right of the appellants to treat the order as one which amended the decree upon the grant of an application for a review.

It has been argued before us that the mistake in the original decree was such as the Subordinate Judge might have amended under s. 206 of the Code without granting a review of his judgment, and that the order of the 3rd February should, therefore, be construed as made under that section. Assuming that the decree might have been amended under that section, and I am inclined to think that it might, the answer to the argument is, that the Subordinate Judge, in making his order of the 3rd of February, was not in point of fact proceeding under that section, but was dealing with an application for a review of judgment; in other words, was proceeding under the review sections of the Code.

It may be that the Subordinate Judge might, instead of granting the appellants' petition at all, have dismissed it and directed them to move under s. 206; but the Subordinate Judge did not adopt that course, but chose to make the amendment in the way and manner I have mentioned. Under these circumstances, the appellants are, in my opinion, entitled to have the benefit which the procedure adopted by the Subordinate Judge has given them, and to treat the order as made upon review of judgment, and therefore as the final decree in the suit.

The appeal will be allowed, the suit remanded to the lower Appellate Court with a direction to hear the appeal and decide it upon the merits.

Case remanded.

Before Mr. Justice Ainslie and Mr. Justice Broughton.

SHEO SHUNKUR SAIHOY (DEFENDANT) v. HIRDEY NARAIN SAHU
(PLAINTIFF).*

1879
June 18.

Certificate of Registrar—Registration Act (VIII of 1871), ss. 49, 60.

Where a Registrar of Assurances has intentionally and deliberately issued a certificate of due registration of a document, with knowledge of certain facts relied on as affecting his power to grant the certificate, the Courts are bound to accept such certificate as due proof of registration, and cannot go behind it for the purpose of satisfying themselves that the Registering Officer has strictly conformed with all the provisions of the Act.

THIS was a suit brought to establish a right of ticcadari barna (an assignment made for the payment of interest) and for recovery of possession of certain properties by completion of a *bonâ fide* contract of ticca zur-i-peshgi (1), under a lease, dated the 30th of Sawan 1282 F.S. (17th August 1875).

The plaint *inter alia* stated that, under a contract entered into between the parties, it was agreed that, in consideration of

* Appeal from Original Decree, No. 6 of 1878, against the decree of W. DuCosta, Esq., First Subordinate Judge of Tirhoot, dated the 19th December 1877.

(1) Money lent in advance upon an usufructuary mortgage.—*Wilson's Glossary of Indian Terms.*

1879 a loan by the plaintiff to the defendant of a sum of Rs. 30,000,
 SHEO the defendant should grant the plaintiff a lease of certain
 SHUNKURⁿ lands for ten years, the rent thereof, with certain deductions, to
 SAHOY be appropriated by the plaintiff towards the payment of interest
 v. (fixed at 12 per cent. *pér annum*) accruing on the said loan;
 HIRDEY that the defendant duly executed a potta on the 17th
 NARAIN August 1875; that the plaintiff paid the said sum of Rs. 30,000
 SAHU. to a creditor of the defendant, such moneys being so paid under
 the direction of the defendant, and in accordance with the
 terms of the agreement; that the defendant subsequently used
 every effort to prevent the registration of the said potta, but,
 that the Sub-Registrar, overruling the objections so made, duly
 registered the same.

The defendant, in his written statement, and in two petitions filed before the Sub-Registrar, denied that the Rs. 30,000 had ever been paid, and further stated that the plaintiff had failed to carry out some of the essential terms of the agreement; he also alleged, that, subsequent to the execution of the potta by the defendant, the mooktear of the plaintiff (the potta being drawn on a stamped paper to which additional sheets had been pasted to add to its length) had tampered with the document by removing one of these pasted sheets, and substituting another spurious sheet in its place.

The order, dated 22nd November 1875, made by the Sub-Registrar at the time of registration was as follows:—
 “Although Sheo Shunker Sahoy, son of Hanuman Sahoy, by caste Sribustah, and zemindar, inhabitant of Mouza Sahdi Buzurg, &c., the executant of this deed, having appeared on the 26th of October 1875, on issue of warrant, made a declaration in solemn affirmation, refusing to cause the registration of the deed, and stated that he wrote this much on the deed which was signed by him,—*i. e.*, that ‘Sheo Shunker Sahoy, malik: this potta executed by me is correct; by my own pen,’—yet, on looking into two petitions, dated 8th September and 21st October 1875 respectively, which, on behalf of Sheo Shunker Sahoy, have been filed in person, it appears that the said Sheo Shunker Sahoy admits the execution and delivery of this potta, and also it appears, from a perusal of this paper, that the stamp paper,

valued Rs. 240, was purchased by Sheo Shunker Sahoy in person from the Collector's treasury at Monghyr; and, on an enquiry being made in the Collectorate of Monghyr, it appears that no other stamp paper except this one, valued Rs. 240, was purchased by Sheo Shunker Sahoy from the treasury of the Monghyr Collectorate. Under these circumstances, it is very clearly evident that Sheo Shunker Sahoy in all respects admits the execution and delivery of this document; therefore, according to the provisions of s. 35 of Act VIII of 1871, this document is registered."

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One of the issues raised at the trial was, whether the potta had been legally registered; and on this point the Court of first instance was of opinion, that the Sub-Registrar having satisfied himself by the evidence produced before him, and the enquiries he himself had made, that the potta had been duly executed, and delivered by the defendant, was not bound, for the purposes of mere registration, to consider the other objections raised by the defendant, and was, therefore, justified in registering the document; and on this ground held, that the registration of the potta was valid.

The defendant, thereupon, appealed to the High Court.

Mr. *Branson* and Baboo *Annoda Pershad Banerjee* for the appellant.

Mr. *Woodroffe* and Mr. *Twidale* and Munshee *Mahomed Yusoof* for the respondent.

The following are judgments of the Court (AINSLIE and BROUGHTON, JJ.), so far as they are material to this report:—

AINSLIE, J.—At the time that this suit was brought, the Registration Act, VIII of 1871, was in force. Section 49 of that Act forbids the Courts to accept or act upon documents of certain classes, unless they are registered in accordance with the provisions of the Act.

The question then arises whether, when a document purporting to have been registered is tendered in evidence, the Court is to accept it on the strength of the certificate of registration endorsed upon it, or whether it is to satisfy itself that the

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Registering Officer has strictly conformed to all the provisions of the Act. It appears to me that the Court is to accept the certificate of registration. In s. 60 it is laid down that a certificate of registration being "signed, sealed, and dated by the Registering Officer, shall then be admissible for the purpose of proving that the document has been duly registered in the manner provided by the Act." It may be that on proof that the Registrar had been deceived, and by a fraud practised on him (*e. g.*, by false personation) had been induced to make a certificate which but for that fraud he would not have made, the Court would hold the certificate void and the document bearing it inadmissible for want of registration; but where, as in this case, it is admitted that the certificate was the intentional and deliberate act of the Registrar, done with knowledge of what is alleged as rendering it void, in my opinion the Court cannot go behind it. The Registrar may have been mistaken in supposing that he ought to register the document, but nevertheless his certificate is under s. 60 sufficient to meet any objection under s. 49. Refusal by a Sub-Registrar to admit a document to registration may be questioned by an appeal to a Registrar, and refusal by a Registrar may be questioned by a petition to the District Court, but there is no provision in the law for revising orders for the admission to registration of a document. The Act makes no provision for altering such orders, and they are consequently final, and the reason for the difference is obvious. The object of the Act is to guard against fabrication of false documents of title from time to time, as the temptation to manufacture them arises, by insisting that all documents of certain classes shall be produced for registration within a limited period of time from the date of execution, and shall be entered in public registers after their execution has been ascertained, so that, their purport and condition being thus fixed, they may not afterwards be open to be tampered with. Registration does not do away with the necessity of proof, except so far, that where a person admits that he has registered a document, he cannot well deny its execution; but he may deny its validity, whether on the ground that he was deceived into executing it, or that the conditions have not been complied with by the person seeking the

benefit of it, or any other ground on which a person may claim to be relieved from the operation of an engagement; and of course he may deny both execution and registration, or he may admit the former and deny the latter. In these two last cases, he in effect asserts that a fraud has been practised not only on himself but on the Registering Officer, and if he can succeed in establishing this, the Registrar's certificate becomes of no effect. Thus the Act, which in s. 49 invalidates documents for non-registration, provides remedies for improper refusals to register, but leaves documents when once registered to be dealt with on their merits by the Courts.

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The appeal must be dismissed with costs.

BROUGHTON, J.—I am entirely of the same opinion. With regard to the objection that the document which is the subject of this suit has not been properly registered, and could not be received in evidence, it appears to me that when a document is presented for registration, the Registrar has a duty to perform which involves an enquiry by him as to whether he should register it or not. Having performed that duty, and having done the act required by the Legislature, it is not possible for us, in the absence of any power for reviewing the act of the Registrar, to go behind it. When a document which purports to have been registered is tendered in evidence, the Court cannot reject it for non-compliance with the Registration Law, but can deal with all other objections against it on their merits.

Appeal dismissed.

Before Mr. Justice Morris and Mr. Justice Prinsep.

1880
June 10.

PEARY LALL MOZOOMDAR (PLAINTIFF) v. KOMAL KISHORE
DASSIA (DEFENDANT).*

*Order of Transfer—Powers of High Court—Code of Civil Procedure
(Act X of 1877), s. 25.*

The High Court cannot make an order of transfer of a case under s. 25 of the Code of Civil Procedure, unless the Court from which the transfer is sought to be made has jurisdiction to try it.

IN this case a rule had been obtained calling upon the defendant to show cause why an order should not be made authorizing the District Judge of Rungpore to try an appeal from a decision of the Subordinate Judge of Rungpore. It appeared that, after the hearing in the lower Court and before the appeal was filed, the land in respect of which the suit was brought was transferred to the district of Pubna, but the appeal was filed in the Court of the District Judge of Rungpore, who, owing to the transfer, had no jurisdiction to hear the appeal.

Baboo *Grija Sunkur Mozumdar* in support of the rule.

Baboo *Ohil Chunder Sen* showed cause.

The judgment of the Court (MORRIS and PRINSEP, JJ.) was delivered by

MORRIS, J.—We cannot pass the order asked for, authorizing the District Judge of Rungpore to try the appeal.

It appears that the suit was tried by the Subordinate Judge of Rungpore. Before the appeal was made, the land which formed the subject-matter of the suit was transferred to the district of Pubna, and the District Court of Pubna, consequently, alone had jurisdiction to hear the appeal. The appeal,

* Rule No. 370 of 1880, issued to show cause why Appeal No. 10 of 1879 in the Court of the Judge of Rungpore should not be heard and determined by that Court.

however, was inadvertently filed in the District Court of Rungpore, where, no doubt, it can more conveniently be tried. But we can, under s. 25 of the Code of Civil Procedure, direct the transfer of an appeal only from a Court having jurisdiction to receive and try it. We have no power to authorize any Court to assume jurisdiction to receive and hear an appeal contrary to the usual course prescribed by the Code. We, therefore, leave the appellant to take the necessary steps to place his appeal in the Pubna Court, and he can then renew his application to us, which is otherwise unobjectionable.

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• Rule discharged.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

HAZIR GAZI (ONE OF THE DEFENDANTS) v. SONAMONEE DASSEE AND
OTHERS (PLAINTIFFS).*

1880
May 28

Res Judicata—Judgment against one Co-Sharer, effect of, on Interest of other Co-Sharers—Code of Civil Procedure (Act X of 1877), s. 13, expl. 5—Repeal, Effect of.

Explanation 5 to s. 13 of the Code of Civil Procedure would not make a judgment obtained in a suit against one co-sharer binding on another co-sharer no party to such suit, in respect of the rights enjoyed in common by such co-sharers in their common property. Nor could such explanation be applied to a case instituted, or the judgment delivered in such case, during the time when the old Code of Civil Procedure was in force.

THIS was a suit to declare the plaintiffs' jamai rights to certain lands.

The plaintiff stated, *inter alia*, that one Dyarkanath Sirkar, son of the plaintiff Sonamonee Dassee, obtained a maurasi lease, dated the 6th May 1859, of twelve and-a-half bigas of land, from one Jarip Gazi and his brother Bonomali Gazi; that the right, title, and interest of these brothers in their lands, together

* Appeal from Appellate Decree, No. 1944 of 1879, against the decree of Alex. T. Maclean, Esq., Judge of the 24-Pargannas, dated the 29th May 1879, reversing the decree of Baboo Romesh Chunder Lahiri, First Munsif of Busirhaut, dated the 12th February 1879.

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with other lands, were purchased by the defendants at an auction-sale; that the plaintiffs thereupon paid the defendants the rent of the lands in their possession; that the defendant, Nadir Gazi, forcibly dispossessed the plaintiffs of two bigas of the lands held by them; that Kedarnath and his mother, plaintiffs in the present case, thereupon instituted a suit in the year 1873, against Nadir Gazi only, to recover the said two bigas of land, and obtained a decree in the Court of first instance, but that the said decree was set aside by the lower Appellate Court; that, pending the time between the remand order made by the High Court in that suit, and the subsequent confirmation of the original decree, both the defendants seized the rest of the lands of the plaintiffs; that Kedarnath died in November 1877; and that the plaintiffs in the present suit became entitled to the lands in dispute.

The defendant Hazir Gazi, in his written statement, alleged that the purchase at the auction-sale mentioned in the plaint was made by both the defendants in the name of the first defendant from joint funds; that the patta relied upon by the plaintiffs was fraudulent, and fabricated by the plaintiffs in collusion with Jarip and Bonomali Gazi, the former owners of the property; that he had not been made a party to the former suit, and that his present contention in respect of the genuineness of the plaintiffs' patta could not be considered as *res judicata* as against him.

¶The defendant Nadir Gazi did not defend the suit.

The Munsif dismissed the plaintiffs' suit, on the ground that they had failed to prove their possession and subsequent dispossession as alleged by them; and he found that the suit was a fraudulent one; and that the patta, and most of the other documents filed by them, were forgeries. The lower Appellate Court was of opinion, that although the defendant Hazir Gazi had not been made a party to the previous suit, yet, he being the brother of the defendant in that suit, and according to his own admission having acquired the superior title to the lands in dispute by purchase with joint funds in that brother's name, was estopped by the provisions of s. 13, expl. 5, from contesting, in the present case, the validity of the patta set up by the plaintiffs, which had already been proved in the former suit, and for this reason reversed the decision of the Court below.

The defendant Hazir Gazi appealed to the High Court.

Baboo *Jogesh Chunder Roy* for the appellant.

Baboo *Nil Madhab Bose* for the respondents.

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The judgment of the Court (JACKSON and TOTTENHAM, JJ.) was delivered by

JACKSON, J.—There must be a remand in this case. The Judge has given to the judgment previously obtained against Nadir Gazi an effect as regards the brother and co-sharer Hazir, which, in our opinion, s. 13 of the Code of Civil Procedure does not warrant. That section provides :—"No Court shall try any suit or issue in which the matter directly and substantially in issue having been directly and substantially in issue in a former suit in a Court of competent jurisdiction, between the same parties, or between parties under whom they or any of them claim, litigating under the same title, has been heard and finally decided by such Court;" and expl. 5, which is referred to, says,— "where persons litigate *bonâ fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of this section, be deemed to claim under the persons so litigating." Now, we are not prepared to say that the explanation has this meaning, that a judgment obtained against a co-sharer in the property is binding against another co-sharer in the property, and clearly it would not be so where the first suit did not purport to have been litigated *bonâ fide* in respect of a right claimed in common by two persons. In addition to that, the judgment relied upon in the present case was obtained long before the enactment of the present Code, and we are not at all prepared to say that expl. 5 of s. 13 would apply to a judgment under the Code now repealed. These considerations very seriously affect the judgment of the lower Appellate Court upon the facts. We think, therefore, that the case must go back for a new trial. The costs will follow the result.

Case remanded.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

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May 21.

KEDARNATH NAG (DEFENDANT) v. KHETTURPAUL SRITIRUTNO
AND ANOTHER (PLAINTIFFS).*

Limitation Act (XV of 1877), sched. ii, art. 120—Breach of Covenant in a Lease.

The defendant took certain land from the plaintiff under a registered lease, which contained a clause prohibiting the defendant from digging a tank on the land without the plaintiff's permission. The defendant having, nevertheless, constructed a tank without such permission, the plaintiff brought a suit to compel him to fill up the tank, or, in case he should fail to do so, for compensation.

Held, that the period of limitation applicable to such a suit was art. 120 of sched. ii of the Limitation Act.

Baboo Sreenath Doss and Baboo Golap Chunder Sircar for the appellant.

Baboo Bhoyrub Chunder Banerjee for the respondent.

THE facts of this case sufficiently appear in the judgment of the Court (JACKSON and TOTTENHAM, JJ.), which was delivered by

TOTTENHAM, J.—The appellant in this case holds a jumma in the estate of the Sobha Bazar Rajah, the late Sir Radha Kant Deb Bahadoor, of which estate the plaintiffs are trustees.

By his lease the defendant was prohibited from digging any tank in his holding without the permission of his lessor. He has, however, excavated a tank, and built pukka ghats, converting the surrounding lands into a garden.

The plaintiffs brought this suit to compel him to fill up the tank, and to restore the land to its original state, or, should he fail to do so, to make him pay them Rs. 715 as compensation.

The defendant pleaded limitation, and further, that the tank

* Appeal from Appellate Decree, No. 1329 of 1879, against the decree of H. Beverley, Esq., Additional Judge of the 24-Pargannas, dated the 9th of April 1879, reversing the decree of Baboo Dwarka Nath Mitter, Munsif of Sealdah, dated the 4th of September 1878.

was excavated with the knowledge and permission of the former executors of the estate, who also made no objection at the time the work was done. The first Court finding that the tank was made at least four years previous to the suit, held, that the plea of limitation was established, because it thought that the suit came under art. 32 of the second schedule of the Act, which prescribes two years as the period for a suit against a person for perverting property to purposes other than the specific purpose for which he has a right to use it. On the merits, the first Court held, that the defendant had failed to make out that he had obtained any permission to excavate; but at the same time held, that the long silence of the plaintiffs and their predecessors, who had quietly allowed the defendant to lay out money in improving the property, implied acquiescence on their part. It considered that, in equity, the plaintiffs were entitled to no relief; and dismissed the suit.

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The Appellate Court was of opinion that the suit did not come under art. 32 of the Limitation Act, but under art. 116, which gives a period of six years (1). It, therefore, overruled the Munsif's decision that the suit was barred by limitation.

On the merits, the Appellate Court held, that the defendant had wrongly broken the conditions of his lease, and that he could not be allowed to plead that he had improved the land, or that his lessors had taken no steps to restrain him at the time he made the tank. The Court gave the plaintiffs a decree, by which the defendant was ordered to fill up the tank within six months, or in default to pay to the plaintiffs a sum of Rs. 300.

The defendant, in this second appeal, contends, that the lower Court was wrong in overruling the plea of limitation; that, under the circumstances, the plaintiffs were not entitled, after so long a period, to an order for the filling up of the tank again with earth, and that, at any rate, no more than nominal damages should have been awarded.

(1) From the judgment of the Appellate Court it appears that the lease was a registered document. See the case of *Nobocoomar Mookhopadhaya v. Siru Mullick*, post, p. 94.

1880 As to limitation we think with the lower Appellate Court
 KEDARNATH that art. 32 does not apply to this case. It seems to us to
 NAG v. fall under art. 120, which gives a period of six years.

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(The subsequent portion of the judgment, in which certain equitable considerations arising in the case are discussed, is not relevant for the purpose of this report. A decree for nominal damages was given.)

Appeal allowed.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

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 May 27. RAMCOOMAR MITTER (PLAINTIFF) v. ICHAMOYIDASI (REPRESENTATIVE OF SHYAMACHARAN SIKKAR, ONE OF THE DEFENDANTS).*

Hindu Widow—Money borrowed to defray Grand-Daughter's Marriage Expenses—Liability of Reversioner.

A Hindu widow borrowed a sum of money for the purpose of defraying the marriage expenses of a grand-daughter, the child of a son who had predeceased his father.

Held, that such sum, although it could not properly be considered a charge on the grandfather's estate, yet was one which was legally recoverable from the heirs, who, on the death of the widow, succeeded to the possession of such estate.

THIS was a suit for the recovery of Rs. 750. The plaintiff alleged that one Nilmoni Sirkar died on the 28th August 1865, leaving him surviving his widow Bindubasini, his daughter-in-law, Bhabasundari, one of the defendants, and three unmarried grand-daughters (daughters of Bhabasundari); that Bindubasini, while in possession of her deceased husband's estate, in order to meet the expenses of the marriage of Kusumkumari, one of these grand-daughters, borrowed, in conjunction with the defendant Bhabasundari, from the plaintiff, the sum of Rs. 750, in two separate sums of Rs. 500 and Rs. 250, obtained on the 25th of May

* Appeal from Appellate Decree, No. 1887 of 1879, against the decree of Baboo Sreenath Roy, Subordinate Judge of Hooghly, dated the 5th May 1879, affirming the decree of Baboo Gobind Chunder Ghose, Second Munsif of Howrah, dated the 10th May 1878.

and the 5th of June 1875, on an agreement to pay back the same by selling a portion of the property of Nilmoni Sirkar, deceased; that Bindubasini died on the 19th November 1875 without carrying out the terms of her agreement; that the defendant Shyamacharan Sirkar obtained a certificate as heir to the estate left by the said Nilmoni Sirkar, and thereby rendered himself liable to the payment to the plaintiff of the sum, the subject of the present suit.

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The defendant Shyamacharan, in his written statement, stated, that the allegation of the plaintiff as to the loan was false; that, not having inherited the immoveable property of Nilmoni Sirkar through Bindubasini, nor through the son of Nilmoni Sirkar, who predeceased his father, he was not bound by any contract entered into by Bindubasini during her lifetime; that the money, if borrowed, had not been obtained for the purpose alleged in the plaint; and even if this allegation was true, a loan for such purpose was not one for which a widow in possession of her husband's property would be entitled to make a charge on such property under Hindu law. The defendant Bhabsundari admitted the debt.

The Court of first instance, on the preliminary point, whether the plaint disclosed a cause of action against the defendant Shyamacharan, was of opinion that, it having been held by a judgment of the High Court—*Khetramani Dasi v. Kashinath Das* (1)—that where a Hindu predeceased his father, leaving no male descendants nor any self-acquired property, his widow was not entitled to maintenance out of the ancestral estate, the same rule would apply with greater force to the daughter of such widow, and thereupon rested its decision, that the debt, even if contracted by Bindubasini for the purpose alleged in the plaint, was a personal debt, and could not, therefore, be considered a legal charge on the deceased husband's estate. The suit was, therefore, dismissed as against the defendant Syamacharan, but decreed against Bhabsundari, who admitted the debt.

The lower Appellate Court was of opinion, that although it might fairly be contended that the marriage of a grand-daughter was a religious duty, which Bindubasini might deem it imperative

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upon herself to perform, yet the obligation was only a moral, and not a legal obligation which could be enforced by the law : and although it was equally clear that a grandfather is burdened with the duty of performing the ceremonies of marriage of a grand-daughter, there was no authority for the proposition that he could be made liable for the expenses attendant on such marriage; and where this liability could not be fixed on the grandfather, it could not afterwards be assumed by his widow. It, therefore, upheld the judgment of the Court below.

The plaintiff Ramcoomar Mitter thereupon appealed to the High Court.

Baboo *Gooroodās Banerji* (with him Baboos *Srish Chunder Chowdhry*, and *Saroda Churn Mitter*) for the appellant.—A Hindu widow can alienate property for the spiritual welfare of her husband: *Dayabhaga*, Chap. XI, Sec. i, pages 56 to 61; *Viramitrodaya*, Chap. III, Part I, Sec. iv (*Golap Chunder Sastri's* translation, page 141); *Collector of Masulipatam v. Cavalry Vencula Narainapah* (1); and *Chowdhry Junmejy Mullick v. Russomoyee Dossee* (2). So debts incurred by a Hindu widow for purposes conducive to the spiritual welfare of her husband are recoverable from her husband's estate in the hand of reversioners: *Umrootram Byragee v. Narayundas Ruseekdas* (3). The marriage of a son's daughter before puberty is necessary for the spiritual welfare of the grandfather: *Dayabhaga*, Chap. XI, Sec. ii, paras. 6 and 7.

Baboo *Prannath Pundit* for the respondent.—The duty of providing marriage expenses attaches to brothers, and not to any more distant relations or collaterals: *Strange's Hindu Law*, Vol. I, pages 170-71 (Lon. Ed., 1830). Under the Hindu law the unmarried daughter's marriage expenses are considered a debt due by the father, and; as such, a charge on the inheritance in the hands of the brothers. The case of *Umrootram Byragee v. Narayundas Ruseekdas* (3) is a Bombay case, and has no application in Bengal.

(1) 8 Moore's I. A., 500; S. C., 2 W. R., P. C., 61.

(2) 11 B. L. R., 418; S. C., 10 W. R., 309.

(3) 2 Borr. (Ed. 1863), p. 201, cited in 1 Mor. Dig., p. 285, No. 39.

The judgment of the Court (JACKSON and TOTTENHAM, JJ.) was delivered by

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JACKSON, J.—We are unable to concur in the judgment of the Courts below, although, of course, in dissenting from two Hindu gentlemen on such a point we feel considerable diffidence. But it appears to us that the plain rules of Hindu law, as well as those of equity and good conscience, are in favor of the plaintiff in this case. If the widow, to whom this money was advanced by the plaintiff, had, in order to pay it off, either alienated or pledged a portion of the estate, we should have had no difficulty at all, because that would have been an alienation or a pledge for a purpose, which is distinctly laudable and recognized as such by authorities on Hindu law;—laudable I say and proper, because the purpose for which the money was borrowed was to promote the marriage of the son's daughter of Bindubasini's deceased husband. Now, it appears to us, and we think it admits of no doubt, that the male issue of such a marriage, supposing a male to result, would be capable of producing spiritual religious benefit to the deceased husband of Bindubasini, being the son of his son's daughter. Then it appears that no alienation took place, and the suit is not to recover a property alienated for such purpose. The matter proceeded no further than the incurring of a debt, and the present suit is to recover that debt. The question is, whether the debt is such as either to amount to a charge upon the estate, or more simply such as the defendants now in possession of the estate of Bindubasini's deceased husband are liable to pay. It appears to us that there is nothing in the circumstances which constitutes it a charge, properly so-called, upon the estate; but we have no doubt that the defendants are liable to pay that debt. There is a case—*Umrootram Byragee v. Narayundas Ruseekdas* (1)—which shows that, in a case much resembling this, apparently the heirs of a deceased Hindu were obliged to pay, and the estate was held liable to satisfy a debt incurred by that deceased Hindu's widow for a proper purpose. That appears to us to be a just and equitable decision, and we think we are entitled to follow it. It appears that if these daugh-

(1) 2 Borr. (Ed. 1863), p. 201, cited in 1 Morley's Digest, p. 285, No. 39.

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ters had not been married before they attained the age of puberty, spiritual consequences of a most serious kind might be expected, according to Hindu doctrines, to arise both to their deceased father and deceased grandfather; and therefore the widow must be held to have been right in doing what she did to avert such consequences. We think the judgment of the lower Courts must be set aside, and as the other points raised have not been determined, the case must go back to the Court of first instance for trial. The costs of this appeal will follow the result.

Case remanded.

Before Mr. Justice White and Mr. Justice Maclean.

1880
 May 17.

IN THE MATTER OF THE PETITION OF NANUK PERSHAD.

NANUK PERSHAD v. LALLA NITYA LALL.*

Appeal—Refusal of District Judge to recall a Certificate under Act XXVII of 1860.

No appeal lies from an order of a District Judge, refusing an application to recall a certificate granted by him under Act XXVII of 1860.

Mr. Twidale for the appellant.

Baboo Mohesh Chunder Chowdhry and *Baboo Chunder Madhub Ghose* for the respondent.

THE facts of this case sufficiently appear from the judgment of the Court (WHITE and MACLEAN, JJ.), which was delivered by

WHITE, J.—This is an appeal against an order of the District Judge refusing an application which was made by the appellant to recall a certificate which had been granted to Lalla Nitya Lall, the respondent, under Act XXVII of 1860, and to grant under that Act a certificate to the appellant, to collect the debts of one Guru Proshad, deceased.

We think that, in such a case as this, no appeal lies to this Court. A District Judge appears to have jurisdiction to enter-

* Appeal from Order, No. 76 of 1880, against the order of J. M. Lewis, Esq., Judge of Bhagalpore, dated the 19th December 1879.

tain an application to recall a certificate which he has granted, although it is by no means clear from the cases which have been cited what is the basis of his jurisdiction, for Act XXVII of 1860, which alone gives him jurisdiction to grant a certificate, is altogether silent on the subject.

But whatever may be the origin of his jurisdiction, we are of opinion that where he has refused to recall a certificate which he has granted, no appeal lies. The Act of 1860, of course, gives no appeal, and looking to the nature of the proceeding, the order being one merely of refusal, does not seem to be of an appealable character. An application to recall a certificate is in the nature of an application to the Judge to review his former decision, and when he refuses the application, he does not appear to do more than decline to alter his first decision.

The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

HARAN CHUNDER BANERJI AND OTHERS (PLAINTIFFS) v. HURRO
MOHUN CHUCKERBUTTY (DEFENDANT).*

1880
May 21.

Hindu Law—Adoption of Grandnephew—Reflection of a Son—Appointment.

A grandnephew may be validly adopted under Hindu law.

Morun Moea Deba v. Bejoy Kishto Gossamee (1) followed.

THIS was a suit for the recovery, with mesne profits, of certain lands, at one time the property of one Nobokishore, deceased, by setting aside his will; and also for a declaration that the adoption of the defendant by Nobokishore was invalid. The plaintiff, *inter alia*, stated, that Nobokishore had died on the 22nd Aughran 1279 (corresponding with 6th December 1872), leaving him surviving his adopted son Bissesshur Banerjee; that Bissesshur Banerjee died on the 22nd Pous 1283 (corresponding

* Appeal, No. 32 of 1879, from a decision of Baboo Brojendro Kumar Seal, Roy Bahadoor, First Subordinate Judge of the 24-Pargannas, dated the 18th November 1878. (1) W. R., Sp. No., 121.

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with 5th January 1877), and that the plaintiffs, as his heirs, were entitled to succeed to his estates; that although Nobokishore had attempted to adopt the defendant Kedarnath, such adoption, having been made during the lifetime of Bissesshur, his previously adopted son, was void under Hindu law. The plaint further charged, that the ceremonies prescribed by the shasters had not been observed at the defendant's adoption, and that the will alleged to have been made by Nobokishore was a forgery.

The defendant, in his written statement, alleged that, on the death of a previously adopted son without issue, Nobokishore had adopted Bissesshur Banerjee, who stood in the relationship of son of one Jogobundhu Banerji, the "*sapinda bhratus putra*" (nephew) of the said Nobokishore; that such adoption having been declared invalid by certain pundits under Hindu law, Nobokishore had thereupon adopted the defendant Kedarnath; that the ceremonies observed at the adoption of the defendant were strictly in accordance with those prescribed by the shasters, and that the will executed by Nobokishore was a genuine will.

The lower Court was of opinion that the adoption of Bissesshur was an invalid adoption. On the facts, the lower Court found that the plaintiffs were the legal heirs of Bissesshur; that the will executed by Nobokishore was a genuine will; and that the ceremonies enjoined by the shasters were duly observed at the time of the defendant Kedarnath's adoption, and dismissed the suit. Against this judgment the plaintiffs appealed to the High Court.

Baboo *Golap Chandra Sirkar*, Baboo *Upendra Chunder Bose*, and Baboo *Mohendro Nath Nag* for the appellants.

Baboo *Troilokho Nath Mitter* and Baboo *Bhowani Churn Dutt* for the respondent.

Baboo *Golap Chandra Sirkar*.—The adoption of Bissesshur was valid, being strictly in accordance with the rule; that a person may adopt a child, if the relationship of the adopter to such child's mother might have been such as would have permitted a valid marriage between them. See *Sutherland's Synopsis*,

head ii; Dattaka Mimansa, sec. v, para. 165; and Dattaka Chandrika, sec. ii, p. 8. The adoption of a grandnephew is not repugnant to the Hindu law—*Morun Moe Debea v. Bejoy Kishto Gossamee* (1), *Chinna Nagaya v. Pedda Nagaya* (2), *Gopal Narhar Safray v. Hanmant Ganesh Safray* (3). The adoption of Bissesshur being valid, Kedarnath's subsequent adoption during the lifetime of Bissesshur is void—*Rungama v. Atchama* (4), *Gopee Lall v. Chundraolee Buhoojee* (5), *Sudanund Mohapattur v. Bonomallee* (6).

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Baboo *Troilokho Nath Mitter*.—Paragraphs. 10 and 11, sec. i, Dattaka Chandrika, simply define the class of persons from which the boy to be adopted is to be selected. The exceptions 'daughter's son,' 'sister's son,' and 'son of mother's sister' therein mentioned, only refer to those cases where the adoptive father can find no son among his *sapindas*, or one born in the same general family. Under this rule, therefore, it would be legal to adopt a brother. This general rule is, however, restricted in its application by paras. 7 to 8, sec. ii, Dattaka Chandrika, and paras. 15 to 20, sec. v, Dattaka Mimansa, which exclude from the choice of the adoptive father all sons of *sapindas* who have not 'the reflection of a son.' Para. 16, sec. v, Dattaka Mimansa, explains what is meant by this expression, *viz.*: "The resemblance of a son, and that is the capability to have sprung from the adopter himself through an appointment (to raise issue on another's wife), and so forth." The following para. gives the commentator's deduction: "Accordingly he says, 'the brother,' 'paternal and maternal uncles,' 'the daughter's son' and that of the 'sister,' are excluded, for they bear not a resemblance to a son;" and in para. 20 he says: "In other words, such person is to be adopted, as with the mother of whom the adopter might have carnal knowledge." The enumeration given in para. 17 is not an exhaustive list, but is given by way of illustration merely. A grandnephew would properly come

(1) W. R., Sp. No., 121.

(4) 4 Moore's I. A., 1.

(2) I. L. R., 1 Mad., 62.

(5) 11 B. L. R., 391; S. C., 19 W.

(3) I. L. R., 3 Bomb., 273.

R., 12.

(6) Marsh., 317; S. C., 2 Hay, 205.

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under this head, he bearing the reflection of a grandson, rather than that of a son. The rule laid down by Sutherland in his Synopsis, head ii, professes to rest on the authority of Dattaka Mimamsa, sec. v, para. 165, and Dattaka Chandrika, sec. ii, para. 8. Now the words there used are 'appointment and so forth.' Appointment does not mean marriage, neither does the phrase 'and so forth' include that ceremony. The authors of these two treatises lived at a time when the custom of 'appointment' had become obsolete; if the word 'marriage' would have served their purpose as well, they would never have gone out of their way to revive an obsolete phrase; the truth is, that these authors endeavoured to explain the vague expression 'reflection of a son' by reference to some understood custom which would sufficiently explain their meaning, and at the same time be comprehensive enough to include all classes of cases. That Sutherland's rule is defective, can be shown from the following illustration: A man might have married a woman whom his father took as a second wife; in other words, he might have married his stepmother when in her maiden state, but he could not even adopt his stepbrother, a relationship which comes clearly within the prohibited list given in para. 17, sec. v, Dattaka Mimamsa. The only test, therefore, by which it can be determined whether the boy proposed to be adopted can be so adopted or not, is by seeing whether there could be an appointment as between the person wishing to adopt and the mother of the boy to be adopted. As to the persons who may be appointed to beget a son on a woman who has no issue, see Menu, chap. ix, v. 59. This verse has been incorrectly translated by Sir W. Jones. The original for "either by his brother or some other sapinda" is *देवराद् वा सपिण्दाद् वा*, the literal meaning of which is "either by husband's brother or sapinda," that is, sapindas in the position of husband's brother, such as a cousin of the husband and so forth. It is clear all sapindas cannot be appointed to raise issue; a father, for instance, cannot be appointed to raise issue on his daughter-in-law. When the author of the Mimamsa says, that a 'reflection of a son' means the capacity to have sprung from the adopter himself through an appointment and so forth, and immediately

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after says,—“accordingly, the brother, the paternal and maternal uncles, the daughter's sons, and that of the sister's are excluded,” he clearly means to say that one, though a sapinda, could not by appointment raise issue on his paternal uncle's mother. If one is incompetent to raise issue by appointment on the mother of his paternal and maternal uncles, he cannot be competent to raise issue on the wife of his cousin's son. Can a widow adopt her uncle's son? see Sir F. Macnaghten's Considerations, 168. A paternal uncle's son cannot be adopted—Cowell's Hindu Law, vol. i, p. 317. Section ii, Dattaka Chandrika gives the two forms of adoption, one of which, under para. 13, it is indispensable to observe. Paras. 3, 5, 7, 9, and 10 give the forms of adoption according to Vriddha Gautoma; para. 11, that according to Vaivashta. The expression ‘reflection of a son’ occurs only in the former, from which it may be argued that it is not essentially necessary according to the Chandrika that the son proposed to be adopted should bear the resemblance of a son. Vriddha Gautoma's form of adoption, however, not only prescribes the ceremonies to be observed, but defines also the qualifications of the boy to be adopted; while that of Vaivashta simply enumerates the ceremonies necessary. It is apparent that the qualifications given by Vriddha Gautama were intended to apply to both forms of adoption. With respect to the case of *Morun Moe Debea v. Bejoy Kishto Gossamee* (1), the question as to the validity of the adoption of a grandnephew was one not properly before the Court. The conclusions arrived at by the Court on this point, therefore, cannot carry the weight of judicial decision.

Baboo Golab Chand Sirkar in reply.

The judgment of the Court (JACKSON and TOTTENHAM, JJ.) was delivered by

TOTTENHAM, J. (who, after shortly stating the facts, proceeded as follows):—The material issues on the merits were, whether the will of Nobokishore, of which probate had been granted, could

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be questioned in this suit; whether the ceremonies enjoined by the Shasters had been duly performed at the defendant's adoption; whether the adoption of Bissesshur was valid or not; and whether, if defendant's adoption be invalid, he is entitled under the will to retain the property.

The Subordinate Judge disposed shortly of all the issues except that which raises the question of the validity of the adoption of Bissesshur. If that adoption was valid, the defendant Kedarnath was not a legally adopted son; if Bissesshur was not legally adopted, then Kedarnath's title cannot be assailed: for that all the proper forms and ceremonies were observed in regard to him was found by the lower Court, and has not been denied before us, though a denial of it was set out in the memorandum of appeal. The lower Court discussed at great length the issue touching the validity of Bissesshur by adoption, and came to the conclusion that it was invalid. It considered that, upon the correct interpretation of certain passages of the Dattaka Chandrika and Dattaka Mimansa, it must be held that a boy cannot be adopted by a Brahmin, unless he be of the same generation as the intending adopter's son would be. The Subordinate Judge relied much upon what he considers to be the true meaning of the somewhat vague phrase "the boy bearing the reflection of a son," which occurs in one of the verses in which the ceremonial rites of adoption are prescribed, as showing that an adopted son cannot be chosen from a generation more than one degree below the adopter. He observes that a grandnephew bears the reflection of a grandson rather than that of a son. In coming to the conclusion which he did upon this point, the Subordinate Judge has been chiefly guided by considerations as to whether there could be an appointment (in the technical sense of Hindu law) as between the person wishing to adopt and the mother of the boy to be adopted. This he considers to be the only test, because the meaning of the phrase 'reflection of a son' is explained by the commentators to be "the capability to have been begotten by the adopter through appointment and so forth." (1)

(1) *Vide* Dattaka Chandrika, sec. ii, paras. 7, 8; Dattaka Mimansa, sec. v, para. 15 *et seq.*

The generally accepted rule deduced from this explanation is (1) that the adopted son's natural mother must be one with whom the adoptive father might have lawfully intermarried while he was yet unmarried, and this rule has been thought to receive support from the prohibition contained in books from adopting a 'daughter's son,' a 'sister's son,' and the 'son of the mother's sister.' There are, no doubt, exceptions to this rule, expressly provided in the prohibition to adopt paternal and maternal uncles, for the 'uncle' may be the step-uncle, and therefore the son of one who might lawfully have been married to the man desiring to adopt. But because of these exceptions, the Subordinate Judge rejects the generally accepted rule which has been judicially affirmed by the High Courts of Madras (2) and Bombay (3) in several reported cases; and for the rejection of which no authority exists in any case decided by this Court or by the Judicial Committee of the Privy Council.

The Subordinate Judge did not overlook the fact that, in deciding that a brother's or cousin's grandson could not legally be adopted, he was acting in direct opposition to a decision of three former Judges of this Court in the case of *Morun Moe Debea v. Bejoy Kishto Gossamee* (4). He considered himself not bound to follow this decision, because, independently of that question, that case was disposed of upon another point which rendered it unnecessary to determine whether the adoption was valid or not; and also because, as he notes, the case was not a Full Bench case properly so called. Whether necessarily or not, however, the question was decided, and the three Judges were unanimous in their opinion. We cannot doubt that they came to that opinion after careful deliberation, for the point was one upon which the two Courts below had differed, and upon which the opinion of the Pundits, accepted as correct by the first Court, was not in accordance with the view adopted in this Court. The decision, therefore, even if it has no more legal

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(1) *Vide* Sutherland's Synopsis; Dattaka Mimamsa, sec. v, para. 20; Dattaka Chandrika, sec. i, para. 11.

(2) *Vide* I. L. R., 1 Mad., 62; 2 Mad. H. C. Rep., 462.

(3) *Vide* I. L. R., 3 Bomb., 273.

(4) W. R., Sp. No., 121.

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force than an expression of opinion, is entitled to very great weight, more especially as one of the Judges was Mr. Justice Sumboonath Pundit. We think that the Subordinate Judge would have done well to follow this opinion and the general course of decisions as to who is eligible for adoption, and that his contrary view must be overruled in this case. We think it by no means clear that the phrase 'the reflection of a son' was intended to bear the limited signification which he has put upon it; and looking to the place in which it is found, we think it is very questionable, whether it was intended to limit the generation from which a son might be adopted, or is anything more than a descriptive epithet applied to the child adopted. The phrase, as has been said, occurs only in the portion of the books which prescribes the ceremonial, and not in the part which lays down rules as to the selection of a son. Had the lawgiver intended to limit the choice to the one generation next below the intending adopter, he would surely have laid it down distinctly, and not have left it to be doubtfully, and with much dispute, evolved from an epithet applied to the child in the verses describing the ceremonies to be performed, and as to whom, those ceremonies have been nearly completed. The passage has no doubt provoked discussion and difference of opinion amongst the Pundits, but so far as either common sense or any judicial authority goes, there is no ground for holding that a grand-nephew or a cousin's grandson, when adopted, does not equally with a nephew bear the reflection of a son. We prefer, therefore, to follow in the course pursued by the Courts hitherto, and to hold that the adoption by Nobokishore Banerjee of Bissesshur was valid. So far, therefore, as the Subordinate Judge's decision in this suit is based upon the finding that Bissesshur was not legally adopted, and that the defendant Kedarnath was, it must be set aside, and the plaintiffs being admittedly the heirs, will have a decree for all the property subject to the rights of Kedarnath, if any, under the will of Nobokishore.

(The learned Judge then proceeded to discuss other points in the case not relevant to this report).

Decree varied.



Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Miller.

KALISHUNKUR DOSS (PLAINTIFF) v GOPAL CHUNDER DUTT
(DEFENDANT)*

1880
May 31.

*Res. Judicata—Prescriptive Right—Civil Procedure Code (Act X of 1877),
s. 13, expl. 5.*

Explanation 5 of s. 13 of Act X of 1877 only applies to cases where several different persons claim an easement or other right under one common title, as for instance, where the inhabitants of a village claim by custom a right of pasturage over the same tract of land or to take water from the same spring or well.

Where therefore *A*, in defending a suit brought against him by *B*, to have it declared that he had a right to build a wall across a drain, set up a prescriptive right to use the drain, and it was decided that no such prescriptive right existed in *A*;

And, subsequently, *C* brought a suit against *B*, claiming to use the same drain as an easement and asking for the removal of the wall in question in the former suit, and *B* set up the judgment in the suit between himself and *A*. as a bar to the suit,—

Held, that the right claimed by *C* not being one which he and other inhabitants of the neighbourhood claimed under one common title, but a prescriptive right which he claimed individually in respect of his own house and premises, and depending upon the length of time he had used the right, was a separate claim, and that the judgment in the suit between *B* and *A* did not operate as a bar to his suit.

THIS was a suit brought by one Kalishunkur Doss, to establish his right to a certain easement, and for an injunction restraining one Gopal Chunder Dutt from interfering with that easement, and for the removal of a wall.

The plaintiff was the owner of a house, the back premises of which adjoined certain lands of the defendant; at the extremity of these premises was a privy belonging to the plaintiff, the refuse from which was in part carried away by a drain over the defendant's land, and partly was removed by the plain-

* Appeal under s. 15 of the Letters Patent, against the decree of Mr. Justice Tottenham, dated the 13th January 1880, in appeal from Appellate Decree, No. 892 of 1879.

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tiff's sweeper, who was accustomed to pass along the drain for that purpose. The plaintiff claimed a prescriptive right to the use of the drain and to the passage of his sweeper along it. The defendant denied the plaintiff's right to any such easement, having some time previously built a wall across the drain in question, in such a manner as to impede the channel and passage; and further contended that the matter was barred by s. 13 of the Civil Procedure Code, inasmuch as, in a former suit brought by him, Gopal Chunder Dutt, against one Koylas Chunder Pal (referred to in the judgment in the present case as "A") to establish a right to build and maintain the wall in question in the present suit, the then defendant had set up a similar right to that claimed by the present plaintiff, and the Court had held that no such right existed. The lower Court held that the judgment between the present defendant and Koylas Chunder Pal operated as a *res judicata* in the present suit, and debarred Kalishunkur Dutt from setting up the present claim..

The plaintiff appealed to the High Court, and the case was heard before a single Judge, who delivered the following judgment:—

TOTTENHAM, J.—In my opinion, the lower Courts were right in holding that the subject of this suit was *res judicata* as explained in s. 13 of the Civil Procedure Code.

It is quite true, generally, that a decision as to one person's right of easement can by no means determine whether or not other persons have or have not a similar right; but I think that, in the suit brought by the present defendant, respondent, against Koylas Chunder Pal, the question whether his neighbours, including the present plaintiff, were or were not entitled to oppose the erection of the wall, was directly and substantially in issue, and was decided by the Court. Although that suit was brought only against Koylas Chunder Pal, he, by his answer, and no doubt, in good faith, claimed the right of passage as belonging to himself and to the occupants of houses on both sides of the drain; the present plaintiff was one of those, and he personally came forward in support of the alleged common right. It is clear that he is, therefore, claiming under

Koylas Chunder Pal within the meaning of expl. 5 of s. 13; and although the decrees in the previous suit expressly negatives only the right of easement set up by Koylas Pal; still I am of opinion that the Court must have had in its mind the fact that the claim raised in the defence was asserted on behalf of all the parties interested in supporting it, and that the decision was intended to settle it as against all. I, therefore, dismiss this appeal with costs.

From this judgment the plaintiff appealed under s. 15 of the Letters Patent.

Mr. C. Gregory for the appellant.

Baboo Umbica Churn Bose for the respondent.

The judgment of the Court (GARTH, C. J., and MITTER, J.) was delivered by

GARTH, C.J. (who, after setting out the facts, continued as follows):—The following sketch will suffice to explain roughly the position of the premises, the nature of the easement, which is the subject of dispute, and the defence to the suit, which we have to consider in this appeal.

Defendant's
land.

⊙ Privy. Plaintiff's house
and premises

Wall erected by the Defendant across the drain. Drain.

House and premises of A, the
subject of former suit

That defence, upon the strength of which the lower Courts and the learned Judge of this Court have dismissed the plaintiff's case is, that, in a former suit, in which another person, whom we will call A, set up a similar right against the present defendant to that now claimed by the plaintiff, it was decided that no such right existed; and it has been held by the lower Courts, and by the learned Judge in this Court, that this judgment between the defendant and A operates as a *res judicata* in this case to debar the present plaintiff from prosecuting his claim.

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We think, however, upon a review of the circumstances of that case, and of the grounds upon which the judgment proceeded, that the plaintiff in this suit is in no way barred by that judgment.

The circumstances are these :—*A* was the owner of a house, (the position of which is shown in the above plan) the back premises of which adjoined the drain in question, in the same way as the plaintiff's premises adjoin it, and *A* claimed to use the drain in the same way as the plaintiff claims to use it, for the passage of his refuse, and as an access for his servants to his back premises.

It then appears that, some time ago, the present defendant, with a view of stopping up this drain, commenced to build the wall, which is now the subject of dispute, and *A* then took proceedings before the Magistrate with a view of preventing the defendant from building the wall, and so stopping up the drain.

The Magistrate, however, finding that the question between the parties was one of civil right, very properly declined to interfere, except so far as to stay the defendant from building his wall until the question of right had been decided by the Civil Court.

A suit was then brought by the present defendant against *A*, asking for a declaration from the Court, that he (the present defendant) had a right to build the wall, and that *A* had no easement which ought to interfere with the defendant's right to build it. *A*, in that suit, set up no doubt a similar right to that which is claimed by the present plaintiff,—i. e., he claimed, that by prescription he had a right to use the drain for the purposes aforesaid, and he went on to say, that other persons (including the present plaintiff), whose premises adjoined the drain, were entitled to a similar right.

Upon the trial of that case, the defendant and his witnesses were examined upon the question, whether he had obtained a twenty years' prescriptive right to use the drain; and the plaintiff and others were also called as witnesses, for the purpose of showing that they too had used the drain for many years in a similar way; but the real claim in that case was founded.

entirely upon *A's* alleged prescriptive right, and the question upon which the judgment of the Court turned was, whether *A* and the occupiers of *A's* premises had acquired such a prescriptive right, and the Judge eventually decided against *A*, upon the express ground, that he had only proved a user of the drain for fifteen years, and consequently had not acquired a prescriptive right under the Limitation Act.

It is perfectly true, that in that case *A* endeavoured to avail himself of the fact that other persons besides himself had also used the drain; but no general or public right of drainage was in fact claimed by him, nor did the question of any prescriptive title enjoyed by the plaintiff or others enter into the consideration of the case. Nor could it have done so, as a matter of law, because, from the very nature of the right claimed, *A* could only succeed *upon the strength of his own title in respect of his own premises*; and no right which the present plaintiff or other persons might have acquired in respect of their premises would have been of any assistance to *A*.

Now, in this case, the point which has been raised by the present defendant, and which all the three Courts have found in his favor, is this,—that the judgment in the former suit has, in fact, decided the same question of right which is raised by the plaintiff in this suit, and the enactment upon which this judgment has proceeded is contained in expl. 5 of s. 13 of the new Civil Procedure Code.

That section enacts, “that no Court shall try any issue, the subject-matter of which has been heard and finally decided by a Court of competent jurisdiction in a former suit.” Then expl. 5 says, that, “where persons litigate *bond fide* in respect of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purpose of s. 13, be deemed to claim under the persons so litigating.”

It has been decided by the previous judgments in this case, that the right claimed by *A* in the former suit, and the right claimed by the plaintiff in the present suit, is a *private right*, “*which he claims in common for himself and others*” within the meaning of expl. 5.

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We cannot agree in this view ; and it appears to us, that the mistake has arisen in consequence of the nature of the right claimed not being correctly understood.

The right claimed by the plaintiff is not one which he and other inhabitants of the neighbourhood claim under one common title. It is a prescriptive right which he claims individually *in respect of his own house and premises*, and depends upon how long he or the occupier of the house have used the right. It would not avail the plaintiff, if all the other owners of the houses in the same locality could prove, that they had used the drain for the prescribed period, if he himself or the occupiers of his premises had not used it for that period. The claim, therefore, of each owner is essentially a separate claim in respect of his own premises. Expl. 5 of s. 13 does not, therefore, apply to such a case. It only applies to cases where several different persons claim an easement or other right by one common title, as for instance, where the inhabitants of a village claim by custom a right of pasturage over the same tract of land or to take water from the same spring or well ; see *Arlett v. Ellis* (1) and *Blewett v. Tregonning* (2). *

In this particular case it is very possible that the plaintiff may be able to prove a twenty years' user of the drain, and so establish his right to it in respect of his own premises, although A, who claimed a similar right, failed to establish it, because he could not prove a user for the full period of twenty years.

We think, therefore, that all the previous judgments in this case should be reversed ; and that the case should go back to the Munsif's Court to be tried upon its merits.

The costs in all the Courts will follow the ultimate result of the cause.

Judgment reversed and case remanded.

(1) 7 B. and C., 346.

(2) 3 Ad. and E., 554.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Miller.

**SUTYABHAMA DASSEE (PLAINTIFF) v. KRISHNA CHUNDER
CHATTERJEE AND ANOTHER (DEFENDANTS).***

1880
May 10.

*Estoppel by pleadings—Ejectment Suit—Denial of Tenancy—Change of
Defence on Appeal—Occupancy Right.*

It is not open to a defendant to change the whole nature of his defence at the last moment, and to set up in a Court of appeal a plea which he has directly and fraudulently repudiated in the Court below.

In an ejectment suit, the defendants, from whom the plaintiff alleged that he had purchased the land from which he sought to eject them, and who had before suit by parol disclaimed the plaintiff's title, set up in their written statement an adverse title in themselves. The lower Court found the plaintiff's allegation to be true.

Held, that the defendants were estopped from contending on appeal that they were occupancy-ryots, and therefore not liable to be ejected; and that by their own conduct they had forfeited the rights which they claimed.

THIS was a suit to eject the defendants from certain lands. The plaintiff stated that these lands were sold to her in 1251 (1844) by the defendants, who, after the sale, continued in possession as her tenants; that such was the relation between them until 1279 (1872), when she called upon the defendants to quit, and on their refusing so to do, she brought this present suit.

The defendants denied the sale and their tenancy, and set up an adverse title, pleading also limitation.

The Munsif found that the plaintiff's title was good, and gave a decree in her favor.

The defendants appealed, and on the appeal set up an occupancy title.

The Subordinate Judge found that the defendants, after having defended the case in the Court below by denying the plaintiff's title, were estopped from claiming to be occupancy-ryots, and dismissed the appeal.

* Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice Maclean, dated the 8th March 1880, in appeal from Appellate Decree No. 1223 of 1879, dated the 22nd July 1878, from the decision of Baboo Bhooputty Roy, Subordinate Judge of Burdwan, affirming the decision of Baboo Chunder Coomar Dass, Munsif of that district.

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The defendants appealed to the High Court, and the appeal was heard before a single judge who delivered the following judgment:

MACLEAN, J.—It appears to me that the plaintiff's suit was misconceived. Assuming the correctness of all that the plaintiff has alleged, she had no right to eject the defendants, or call in the assistance of the Court to turn them out.

The plaintiff's case was, that the defendants were tenants of upwards of thirty years' standing, though for about five years they had ceased to pay rent. Under these circumstances, if the plaintiff had sued for arrears of rent, coupled with a demand for ejectment, it is very possible that she might have obtained a decree; but it is impossible to forget that she has herself proved in the clearest manner that the defendants are ryots with a right of occupancy; and as such ryots can only be ejected in execution of a decree or order under the provisions of Beng. Act VIII of 1869, and as there is no provision in the law for ejecting save for nonpayment of rent or termination of a lease, the conclusion to which I come is, that the defendants are not liable to be ejected simply because they refused to vacate the land at the bidding of the plaintiff's servants.

In this view of the law, I must allow this appeal, reverse the decision of the Subordinate Judge, and dismiss the plaintiff's suit with costs.

The plaintiff appealed under s. 15 of the Letters Patent.

Baboo Taruck Nath Sen for the appellant.

Baboo Bamu Churn Banerjee for the respondents.

The judgment of the Court (GARTH, C. J., and MITTER, J.) was delivered by

GARTH, C. J.—In this case we are unable to agree with the view which the learned Judge has taken.

The plaintiff brought her suit under these circumstances: She says, that the defendants sold to her the property in question, of which she is now seeking to recover khas possession, some thirty years ago; that, after they had sold it to her, they became her tenants at a certain rent; that, from that time up to about

five years ago, this rent was duly paid; that, upon their ceasing to pay her rent, she demanded it from them, but they then told her they were no tenants of hers, and that she was not their landlord,—in fact they set up an adverse title, and denied that they had ever sold her the land. Consequently, after waiting some time, she brought the present suit to eject them.

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Upon this, the defendants, not content with their parol disclaimer of the plaintiff's title, set up in their written statement that the kobala under which they sold this land to her was a false deed; that they never sold the land at all, nor became the plaintiff's tenants, nor paid her any rent,—in fact, that they never had anything to do with her, and they then set up an adverse title in themselves.

Upon this written statement the issues were framed, and the trial proceeded. The Munsif found that the plaintiff's case was substantially true; that the defendants had repudiated the plaintiff's title, and that the plaintiff was entitled to recover possession on that ground.

In the course of the trial, the plaintiff proved (in fact it formed part of her case to prove) that, at one time, the defendants, for many years, were her tenants, and paid her rent. It seems that they paid her rent sometimes in money and sometimes in produce.

The defendants then appealed to the Subordinate Judge. They again asserted that the defence set up in their written statement was true, and they contested the case again on the issues raised in the Court of first instance. But they contended also in the alternative, that if those issues were found against them, they then had a right to turn round and claim to be the plaintiff's tenants; and as she (the plaintiff) proved that they had been paying rent to her for so many years, they were entitled to a decree in this suit, upon the ground that they were occupancy-ryots, and that as such they could not be ejected. In fact, they tried to take advantage of a plea which they had directly repudiated in the Court of the first instance.

The lower Appellate Court considered that it was not competent for the defendants to set up that defence; that, having defended this suit upon the very ground that they were not

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the plaintiff's tenants, and had nothing to do with her, they were estopped by their own conduct from claiming to be her occupancy-ryots.

In this Court, however, the learned Judge appears to have taken a different view. He seems to think, that as the plaintiff proved in the Court of first instance that, for several years, the defendants had paid her rent, she had misconceived her suit, and that the course she ought to have taken was to have sued the defendants under the Rent Law for rent, and for ejectment in the event of its nonpayment. He, consequently, dismissed the plaintiff's suit with costs.

We are quite unable to take this view of the case. It may be, that if the defendants had merely verbally disclaimed their landlord's title before the suit, and had pleaded their occupancy title when the suit was brought, their parol disclaimer might not have affected their real rights; or even if the defence had been founded upon a *bond fide* mistake, and they had found out their mistake in the course of the trial, and had applied to withdraw their defence and plead their right of occupancy, it is possible that (subject to any question of costs) they might properly have been allowed to take advantage of their true position.

But that certainly was not the case here. The defendants knowingly and wilfully denied their landlord's title. They repudiated the kobala which they had themselves executed: they tried their best to defeat her rights, and set up an adverse title in themselves.

Under these circumstances, we think that, by their own conduct, they have forfeited the right which they now claim, and that the Court ought not to assist persons who knowingly attempt these frauds.

The rule of English law is, that where, by matter of record, a tenant disclaims his landlord's title, and sets up an adverse title either in himself or in some third party, he thereby forfeits his tenancy. But without laying down any absolute rule here with regard to forfeiture in such cases, we think we are clearly justified in a case of this kind in refusing to allow defendants to change the whole nature of their defence at the last moment,

and to set up in a Court of appeal a plea which they had directly and fraudulently repudiated in the Court below; see *Dabee Misser v Mungur Meah* (1). We, therefore, think it right to reverse the decision of the learned Judge of this Court, and to restore the judgment of the Court below. The appellant will have her costs of both hearings in this Court.

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Appeal allowed.

APPELLATE CRIMINAL.

Before Mr. Justice Morris and Mr. Justice Prinsep.

THE EMPRESS v. BUTOKRISTO DASS AND ANOTHER.*

1880
May 3.

*Conduct of Prosecution by Advocate or Attorney—Permission by Magistrate—
Presidency Magistrates' Act (IV of 1877), s. 129.*

With the exception of the Advocate-General, Standing Counsel, Government Solicitor, or other officer generally or specially empowered by the Local Government in that behalf, no person, whether counsel or attorney, can claim the right to conduct the prosecution of any criminal case without the permission of the Presidency Magistrate.

THE following letter of reference under s. 240 of Act IV of 1877 (The Presidency Magistrates' Act) was sent by the Chief Presidency Magistrate, with the object of eliciting an expression of opinion from the High Court on the question therein asked:—

"I have the honor, under s. 240 of Act IV of 1877, to refer, for the opinion of the High Court, the following question:—

"Under s. 129, Presidency Magistrates' Act, are counsel or attorneys entitled, as a right, to prosecute cases in the Presidency Magistrate's Court, or must they obtain the sanction of the Magistrate to do so?"

The opinion of the Court (MORRIS and PRINSEP, JJ.) was as follows:—

MORRIS, J.—In our opinion, under s. 129 of the Presidency Magistrates' Act, with the exception of the Advocate-General,

* Criminal Reference, No. 95 of 1880, made by F. J. Marsden, Esq., Chief Presidency Magistrate of Calcutta, dated the 26th April 1880.

(1) 2 C. L. R., 208.

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Standing Counsel, Government Solicitor, or other officer generally or specially empowered by the Local Government in that behalf, no person, whether counsel or attorney, can claim the right to conduct the prosecution of any criminal case without the permission of the Presidency Magistrate.

ORIGINAL CIVIL.

Before Mr. Justice Wilson.

GOVIND CHUNDER GOSWAMI v. RUNGUNMONEY.

1880
 March 18.

Limitation Act (XV of 1877), sched. ii, art. 178—Application to revive a case and restore it to the Board.

After a decree had been made in a suit, the case was, in 1875, struck out of the board for want of prosecution. No steps were taken to have it restored. In 1879 both the plaintiff and defendant died. In the same year the heirs of the plaintiff instituted a suit against the administrator of the defendant for the purpose of having the decree in the original suit carried out. This suit was dismissed by the Court of first instance under s. 13 of the Code of Civil Procedure, but the Appellate Court, holding that the original suit was subsisting and might be reconstituted, directed that the plaintiffs should be allowed to amend their plaint by putting it into the form of a petition under s. 372 of the Code. On a petition by the plaintiffs praying that the original suit might be revived and restored to the board,—

Held, that the application was not barred under art. 178 of sched. ii to the Limitation Act of 1877.

Even if art. 178 was applicable, the application would not be barred, limitation running from the time when the suit was allowed to be reconstituted.

The Legislature did not intend to include in the Limitation Act every application to a Court with reference to its own list of causes, such as applications to transfer a case from one board to another, to transfer a case to the bottom of the board, change of attorneys, and so forth.

THIS was an application to revive a certain suit and to have it restored to the board of causes. It appeared that one Cossinath Mullick died, leaving a will, of which he appointed his wife, Rungunmoney Dossee, executrix, and by which he appointed one Govind Chunder Goswami trustee for the purpose of carrying out certain religious trusts. On the 4th of June 1869, Govind

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Chunder Goswami instituted a suit against Rungunmoney Dossee, praying that the trusts of the will might be established and carried into execution. By a decree in that suit made on the 6th of December 1869, the will was established, and it was declared that the trusts ought to be performed, and certain enquiries were directed to be made for the purpose of having a scheme settled by which the trusts were to be carried out. Before this scheme was finally settled and approved, and while the proceedings were pending, the case was, on the 14th of August 1875, struck out of the board for want of prosecution. On the 12th of March the Administrator-General of Bengal obtained a transfer of the estate of Cossinath Mullick from Rungunmoney Dossee under s. 31 of Act II of 1874. Govind Chunder Goswami died on the 9th of April 1879, and Rungunmoney Dossee died on the 14th of the same month, leaving a will, of which she appointed the Administrator-General executor, and of which will he obtained probate. On the 14th of June 1869, the sons of Govind Chunder Goswami, claiming, according to Hindu law and usage, to be entitled to the benefit of the religious trusts in the will mentioned, and to perform the acts and services therein prescribed in the place of their father, instituted a suit against the Administrator-General for the purpose of having the trusts of the will and the decrees in the original suit carried out. This suit was dismissed by Broughton, J., under s. 13 of the Civil Procedure Code. The plaintiffs appealed, and on appeal (1) it was held, that the effect of striking out the original suit was not to put an end to it, but that it was subsisting and could be reconstituted, and that the plaintiffs should be allowed to amend their plaint by putting it into the form of a petition under s. 372 of the Civil Procedure Code.

The plaintiffs now presented a petition, praying for an order that the original suit might be revived and restored to the board of causes; that their names might be inserted in the record as parties plaintiffs in the place of Govind Chunder Goswami; and that the name of the Administrator-General of Bengal as representative of the estates of Cossinath Mullick

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and Rungunmoney Dossee might be substituted as party defendant in the place of Rungunmoney Dossee.

Mr. *Phillips* for the plaintiffs.

Mr. *Bonnerjee* for the Administrator-General.

Mr. *Bonnerjee*.—The principal point is, whether the plaintiffs are now entitled to have the case which was struck out of the board restored to it. I submit that the application is barred by limitation under art. 178 of sched. ii of Act XV of 1877, which provides a period of three years' limitation for applications for which no period of limitation is provided elsewhere in the schedule or by the Code of Civil Procedure, s. 230, from the time when the right to apply accrues. Section 4 of the Act provides, that "every suit instituted, appeal presented, and application made, after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation is not set up as a defence." Section 5 provides, that "any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period." This is not an application for a review, but an application "not otherwise provided for." The right to apply accrued on the day after the day when the case was struck out,—namely, the 15th of August 1875. The plaintiff was bound to go on with due expedition. It was through his default that the suit was struck out, and he should have applied immediately to have the case restored, and therefore, in the absence of any particular rule, the right accrued immediately after the case was struck out, just as in a suit on a bond or promissory note the time begins to run immediately after the money is payable. The question is, whether the present applicants are entitled to say that their right accrued on the death of their father, and not on the day when he might have applied to have the case restored. If they took by descent and not as purchasers, whatever barred the

father barred them. I submit that their rights come to them as heirs and not as purchasers.

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Mr. Phillips.—Article 178 has no application to this case. The Court can, of its own motion, restore the case to the board. We had no right till 1879, when Govind Chunder Goswami died. If there is anything at all in the point of limitation, it should have been brought before the Appellate Court. That Court did not decide that our suit would not lie, but held that another mode of procedure was right. It is admitted that the suit must be revived. When revived, the right to apply to restore it arises.

Cur. ad. vult.

WILSON, J.—In this case a decree had been made and a reference ordered. Then in 1875 the case was struck out of the reference list under Rule 537 in Mr. Belchambers's book, and the application now made is to restore it. The application made is to reconstitute the suit and restore it. The Court of appeal in this case has decided the effect of this rule, and held, that the case being struck out is not to put an end to the suit, but that it is an existing suit, so that it can be reconstituted. It was contended that the Court had no power to grant the second part of the application, namely, to restore the case, and the objection is taken on the ground of limitation: art. 178 of the third division of the Schedule to the Act.

Under that article the period of limitation was three years. The words of that article are perfectly general: "Applications for which no period of limitation is provided elsewhere in this schedule, or by the Code of Civil Procedure, s. 230."

But as in all cases where general words are used, the general words must be construed with some limitation with reference to the words they follow. I do not propose to attempt to say what class of applications fall under this article, but I do not think that article applies to this case.

This is a pending suit; it has not terminated; and the application is, that the Court should deal in a certain way with its own cause. I do not think the Legislature intended to include every application to the Court in reference to its own list, such

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as applications to transfer a case from one board to another, to transfer a case to the bottom of the board, change of attorneys, and so forth. The Legislature did not intend to deal with such applications as this, and I do not think the article applies to this application. Even if the case fell within the article, I do not think I should feel constrained to say that this application should be refused. One may fairly say when the Court allows a suit to be reconstituted, a new right accrues and the limitation runs from that time.

The application is granted in the terms of the petition, that is to say, the suit will be reconstituted as asked for, and will take its place in the reference list.

Application granted.

SMALL CAUSE COURT REFERENCE.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

1880
July 23.

BULDEO DOSS v. HOWE.*

Sale of Goods—Delivery at Certain Date—Rescission of Contract—Vendor's Remedies—Time of Essence of Contract—Contract Act (IX of 1872), ss. 55, 107.

In a contract for the sale of ascertained goods, terms cash on delivery, to be given and taken in ten or eleven days, the vendee obtained an extension of the time for the performance of the contract, agreeing to pay godown rent and interest. He took delivery of, and paid for, some of the goods, and subsequently obtained a further extension of time. A small balance remained in the vendors' hands, after giving the vendee credit for the goods taken delivery of, godown rent, and interest. After the expiration of the further time, the vendee tendered the price of the remaining goods, and demanded delivery, when the vendors stated that they had rescinded the contract. In an action for damages for non-delivery, *Held*, that time was of the essence of the contract, and that, under s. 55 of the Contract Act, the vendors were entitled to rescind.

• CASE referred from the Calcutta Small Cause Court.

* Case stated for the opinion of the High Court, under s. 7 of Act XXVI of 1864, by H. Millett, Esq., and Baboo Koonjoolall Banerjee, Judges of the Calcutta Court of Small Causes.

On the 8th August 1879, the defendants sold fifty chests of shell lac to Messrs. Fornaro Brothers. The contract was by bought and sold notes, and the terms were cash on delivery, which was to be given and taken in ten or eleven days at buyers' option. Messrs. Fornaro Brothers transferred the contract to the plaintiff. At the expiration of the period mentioned for delivery, the defendants, at the request of the plaintiff, extended the time for delivery, the plaintiff agreeing to pay godown rent and interest on the purchase-money. On the 26th of September, the plaintiff took delivery of, and paid for, twenty chests of shell lac, a small balance (not sufficient to cover the price of one chest) remaining in the defendants' hands after deducting the price of the twenty chests, godown rent, and interest, and the following receipt was granted: "Calcutta, 26th September, 1879. Received of Baboo Buldeo Doss Chutterbhooj, on account of his purchase of fifty cases shell lac, through Messrs. Fornaro Brothers, the sum of Rs. 1,130 only." This delivery the learned First Judge found not to be a delivery of part of the goods in progress of the delivery of the whole. On the 4th or 5th October the plaintiff obtained a further extension of time for one week, bringing the period of delivery to the 12th October. On the 25th or 27th of October, the plaintiff tendered the price of the remaining thirty cases to the defendants, and asked for delivery, but the defendants stated that they considered the contract to be at an end. The learned First Judge found, that the sale was of ascertained goods, and being of opinion that, under s. 55 of the Contract Act, the plaintiff could not recover, directed judgment to be entered up for the defendants.

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A new trial was subsequently granted and heard before the First and Second Judges, and the case was referred for the opinion of the High Court upon the following question:—"Whether, on the facts as found, the defendants were entitled to refuse delivery of the goods on the 25th or 27th October?" The learned Judges, after stating that, in their opinion, their decision must be based on the Contract Act only, and not on the English law, and referring to the judgment of Couch, C J., in *Greenwood v. Holquette* (1), as an authority for that opinion, held, that this

1880 *was a case in which time was of the essence of the contract, and*
BULDERO DOSS *the defendants had a right to rescind the contract, on the plain-*
tiffs' omitting to take delivery within the time allowed. They
HOWE. *found that the plaintiff would be entitled to Rs. 637-8 damages,*
should the opinion of the High Court be in his favour, but
contingent on that opinion they gave judgment for the defendants.

Mr. Agnew for the plaintiff.

Mr. R. Allen for the defendants.

Mr. Agnew.—This was a sale of ascertained goods. There has been a part-payment of the price, and a part-delivery; and the property in the goods has, according to both English and Indian law, passed to the plaintiff: *Martindale v. Smith* (1); Contract Act, s. 78. The Contract Act gives an unpaid vendor of ascertained goods certain remedies. He has his lien under ss. 95—98 so long as the goods remain in his possession; or he may resell under s. 107, and he would, of course be entitled to sue the vendee for the difference in case of loss on the resale. If the goods are in the course of transit to the purchaser, the vendor may stop them under ss. 99—106. These remedies correspond with the remedies which an unpaid vendor has under the English law. [PONTIFEX, J.—How long is the vendor to keep the goods if the vendee fails to take delivery at the time stipulated?] He must keep them for a reasonable time, and at all events should call upon the vendee to take delivery. The defendants ought to have tendered the goods to the plaintiff, and then, if the plaintiff refused to pay the price, would have been entitled to exercise their rights as unpaid vendors. Default in payment of the price is not such a breach as will entitle a vendor to rescind. In *Martindale v. Smith* (1), Lord Denman, C. J., says:—"Having taken time to consider our judgment owing to the doubt excited by a most ingenious argument, whether the vendor has not a right to treat the sale as at an end, and re-invest the property in himself by reason of the vendee's failure to pay the price at the appointed time, we are clearly of opinion that he had no such

right, and that the action" (which was one for trover) "is well brought against him. For the sale of a specific chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price, and a lien upon the goods if they remain in his possession until that price be paid. But that default of payment does not rescind the contract." In *Sooltan Chund v. Schiller* (1) it was held, that default in payment of the price did not authorise the vendors to rescind the contract under s. 55. Suppose the goods had been destroyed in any way after the 12th October, and before the plaintiff tendered the price, he would have been liable for the loss, as the property in the goods had passed to him: Contract Act, s. 86; *Shoshi Mohun Pal Chowdry v. Nobokrishto Poddar* (2). Section 55 does not apply to the case of a sale of ascertained goods, but to sales of specific chattels conditionally, as where the vendor is to do something to the goods before delivery, or where the goods are to be tested, or weighed, or measured. The thing to be done must be in the nature of a condition precedent—*Simpson v. Crippin* (3). But even if s. 55 does apply to a sale of ascertained goods, time was not of the essence of the contract here. In order that time may be of the essence of the contract, it must go to the very root of the consideration, and there must be direct stipulation or necessary implication. The "intention of the parties" must be the intention of both parties, not of one. It clearly was not the intention of the plaintiff that the contract should be at an end, and if he did not pay the price on the 12th October, he had agreed to pay godown rent and interest, and the bargain was an advantageous one for him. Besides he afterwards urged and demanded compliance with the contract, thereby showing that he did not understand it to be at an end. There was a part-payment of the price of the undelivered goods when the twenty chests were taken. Even if the vendors had the right to rescind, they should have given the plaintiff notice of their intention. In rescinding, as in making a contract, both parties must concur: *Franklin v. Miller* (4).

(1) I. L. R., 4 Calc., 252.

(3) L. R., 8 Q. B., 14.

(2) *Id.*, 801.

(4) 4 A. and E., 599.

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Mr. R. Allen.—English law cannot be considered in this case. It must be governed by the Contract Act. There is nothing in the Act to show that s. 55 is not to apply to contracts for the sale of ascertained goods, and the section itself is wide enough to include such contracts. The effect of extending the time for delivery was to make it of the essence of the contract, that delivery should be taken not later than the 12th October. The case of *Sooltan Chund v. Schiller* (1) does not apply. The contract there was not for the sale of ascertained goods, nor was time of the essence of the contract. The case of *Shoshi Mohun Pal Chowdry v. Nobokrishto Poddar* (2) merely asserts the propositions laid down by the Contract Act.

Mr. Agnew in reply.

The following judgments were delivered :—

GARTH, C. J.—I think that, under the circumstances, the defendants were justified in refusing delivery of the goods. It has been contended, that as the goods were ascertained, and the time for their delivery and for payment of the price had been postponed, the property in them had passed to the plaintiff, (see s. 78 of the Contract Act); and that, consequently, the defendants' only remedy was to resell them after notice to the buyer under s. 107 of the same Act. Now, that section is headed "Re-sale," and it provides under what circumstances the vendor of ascertained goods has a right to resell them. But that is not the vendor's only remedy; and I can see no reason why s. 55, which provides for the rescission of contracts in certain events, should not apply to the present case.

We are bound, I think, to determine questions of this kind, so far as we can, by reference to the Contract Act, and not to English law; and ss. 51 to 58 appear to contain general provisions, which are applicable to all cases of reciprocal promises.

In this case, whether the property in the goods had passed or not, the parties had, undoubtedly, reciprocally promised,—the plaintiff to pay the price, and the defendants to deliver the goods, on a given day; and it is found by the Court below, that time was of the essence of the contract. In such a case s. 55

(1) I. L. R., 4 Calc., 252.

(2) *Id.*, 801.

provides, that if the buyer is not ready and willing to pay the price at the time agreed upon, the seller has a right to rescind the contract, and to refuse to deliver the goods; and I consider that, upon the rescission, the property in the goods sold reverted in the seller. It has been contended that the surplus money, paid to the defendants on the occasion of the delivery of the first twenty chests, was a part-payment of the price of the remaining thirty chests, which prevented the application of s. 55. But it has been found as a fact by the lower Court, that the delivery of the twenty chests was not "a delivery of part of the goods in progress of delivery of the whole." And whether this was so or not, I do not see why s. 55 should not apply; the plaintiff having the right, of course upon the rescission of the contract, to receive back the small balance due to him from the defendants. I think, therefore, that the judgment of the Court below should be confirmed, and that the plaintiff should pay the costs of this reference.

PONTIFEX, J.—I think that, under the circumstances stated, the defendants had a right to rescind and refuse delivery. The facts of further time having been given, and the plaintiff having agreed to pay godown rent for such further time, show, in my opinion, that time was of the essence of the amended contract, and bring the case within s. 55 of the Contract Act. But it is argued, that s. 55 applies only to contracts when the property in the goods sold does not pass to the buyer; that here the goods were ascertained, and by the proper construction of the contract the property in them passed to the plaintiff, and that s. 107 declares the remedy of the vendor under such circumstances.

No doubt, s. 107 declares one remedy, but it is only a partial remedy, for the purchaser might be insolvent and the market depressed, in which case it would be small satisfaction for the vendor to resell. Besides, s. 55 contains in itself words "or so much of it as has not been performed," which, in my opinion, show, that it was intended to apply to cases where the property in the goods passed by the contract, as much as to contracts where the property did not pass. And s. 39 contains similar words.

If there had been any machinery for the purpose in the Small

1890 Cause Court procedure, the defendants ought to have paid the
 BULDEO DOSS small balance in their hands into Court. As there was no such
 v. machinery, and as the sum is insignificant in amount, I think
 HOWE. that it ought to be disregarded, though of course the defendants
 are liable to repay it to the plaintiff.

Attorney for the plaintiff: Mr. Hart.

Attorneys for the defendants: Messrs. Sanderson & Co.

INSOLVENCY JURISDICTION.

Before Mr. Justice Wilson.

1880
 June 14.

IN THE MATTER OF THE PETITION OF D. COWIE AND ANOTHER.

Insolvent Act (11 and 12 Vict., c. 21), s. 51—Breach of Trust—Mixing Trust-Funds with Money of Trustees—Commission on Trust-Moneys—Expectation of paying Debts—Deferring Personal Discharge.

The words in s. 51 of the Insolvent Act relating to debts contracted—"without having any reasonable or probable expectation at the time when contracted of paying them"—are pointed, not at the case of a man who incurs a debt knowing that he cannot pay his debts generally, but at that of a man who incurs a debt knowing that he cannot repay that debt. The words in the same section—"if it shall appear that the insolvent's whole debts so greatly exceeded his means of providing for the payment thereof during the time when the same were in course of being contracted, reference being had to his actual and expected property as to show gross misconduct in contracting the same,"—apply not to this or that debt, or class of debts, but to all the debts, contracted for some years past. And under the circumstances of the case afford ground not for excepting any specified debt under s. 51, but for deferring the discharge under s. 47.

It is a grave breach of duty in trustees, or administrators taking out letters of administration, to estates in this country under powers-of-attorney from executors or next-of-kin abroad, to mix the incomes raised by them from trust-properties, or the funds of the estate, in one common fund with their own moneys, and such a course of dealing may expose the trustees or administrators to criminal as well as civil liabilities.

The insolvents carried on business as bankers and commission agents, receiving the money of their constituents, on deposit, for investment or for remittance, charging a commission on each transaction, and allowing

4 per cent. interest on deposits. An opposing creditor, one of their constituents, sent them in April 1880 a letter instructing them to invest Rs. 40,000 in Municipal debentures. The insolvents failed in November, and it was found on the evidence that they could not have procured the desired quantity of Municipal debentures without paying more than the market-price for them. They purchased Rs. 18,000 worth of such debentures, and were debtors to the opposing creditor for the balance. *Held*, that the money was in their hands as bankers and not as agents; and this being so, they were not bound to keep the Rs. 40,000 separate from their own funds, nor even after the letter received in April to set it apart for investment.

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THIS was an application by two of the members of an insolvent firm for their personal discharge.

The facts of this case fully appear from the judgment.

Mr. Phillips and *Mr. Stokoe* for the insolvents.

Mr. Bonnerjee for an opposing creditor.

WILSON, J.—The insolvents in this case, Messrs. David Cowie and John Cowie, with Bazett Colvin, were the partners in the firm of Colvin, Cowie, and Co. This case was heard on the 8th, 9th, and 10th instant; and the question for decision is, whether the insolvents are entitled to their personal discharge.

The firm is one of old standing. From the year 1869, the partners have been the three gentlemen I have named.

Down to the year 1874, the firm carried on business as merchants, business in goods on commission, and business as bankers and agents.

Between 1871 and 1874 they sustained heavy losses, in consequence of unsuccessful consignments of goods to Europe. At this time, Mr. David Cowie, the senior partner, was in Europe. In August 1874, he returned to Calcutta. The losses sustained during the period I have mentioned are stated by Mr. David Cowie to have amounted to Rs. 5,00,000. This amount afterwards resolved itself into three heads:—(i) a sum of about Rs. 2,00,000, which sum, in the annual balance sheets prepared by the partners for their own use, is entered to the debit of their shipping account simply "lost;" (ii) a debt, fluctuating somewhat, but always over Rs. 1,00,000, to Messrs. Crawford, Colvin & Co., a London firm, with whom the insolvents had business connec-

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tions; (iii) a large sum, the exact amount of which was not stated, which Mr. D. Cowie said was properly a debt to the same firm, but which the latter remitted.

It was the practice of the firm to make up their accounts to the 30th April of each year, but naturally the actual adjustment took place later. The books for the year ending 30th April 1875 were made up on the 19th October 1875. The result of the balance sheet then struck (being the balance of assets and liabilities up to the 30th April 1875) was as follows:—Liabilities, Rs. 13,58,940, as against the assets, showed a deficit of rather over Rs. 2,00,000. The balance sheet to April 1876 showed a deficit of Rs. 2,71,240; that to April 1877, Rs. 2,76,267; that to April 1878, Rs. 3,21,236; that to April 1879, Rs. 4,37,185. It is right to add that the large increase in this year is due, not to any real change in the state of affairs, but to the fact that debts hitherto treated as hopeful were now written off as bad. Stating the matter in another way, the firm could, in April 1875, have paid twelve or thirteen annas in the rupee. After a steady decline, the assets now have about half that proportion to the liabilities.

The profits of the year ending April 1875 were Rs. 16,950; those to April 1876, Rs. 52,400; those to April 1877, Rs. 35,025, after writing off in this last year Rs. 722 of bad debts of earlier years.

From the year 1874, the firm almost entirely abandoned their business as merchants, and from about the middle of 1877, a further change took place. Their business as merchants came entirely to an end, and their dealings in goods on commission also ceased, and has never been resumed. There remained nothing but the banking and agency business. That business consisted almost entirely in dealing with the money of their constituents. The only other element shown to have existed in the business, was that of shipping agents—the consignment of ships to the insolvents—for which they were remunerated by a small percentage on the freight receivable here. The extent of this latter business Mr. David Cowie was not able to state, because the accounts of it were not kept separate from the general agency business. But having regard to the total profits from

year to year, its results can hardly have been very important financially. About the same time occurred the circumstances which I notice, because they are favorable to the insolvents. Mr. John Cowie had, in the course of fifteen or sixteen years, overdrawn somewhat largely as between himself and the firm. In the year 1876, he borrowed from a relative Rs. 30,000, which he paid into the firm in reduction of his overdraft. Mr. David Cowie, in the same year, paid Rs. 29,235, the proceeds of a legacy, which he received; and Mr. Colvin, in May 1877, Rs. 20,000, which he borrowed from a relative.

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It is well at this point to consider the exact nature of the business henceforth carried on by the insolvents, and the financial condition of the firm at that time,—that is, to the middle of 1877. The business was that of bankers and agents. They received the money of their constituents on deposit, for investment, or for remittance, charging a commission on each transaction, and allowing 4 per cent. interest on deposits.

The condition of the business was this. The firm were worth 2½ lacs less than nothing. There was a steady drain upon the business in the form of interest at 5 per cent. upon the old debt to Crawford, Colvin, & Co, which never stood lower than Rs. 1,00,000. This deficit had gone on increasing since 1874. The partners had brought into the business everything that they could raise for the purpose, and every kind of business other than the banking and agency business had come to an end. The business was continued with the results shown in the yearly balance sheets, to which I have already referred. On the 20th October 1879, the firm closed their place of business for the *Pujah* holidays, which lasted to the 31st October, inclusive. During the *Pujahs*, orders for remittance and investments had accumulated to the amount of Rs. 1,20,000, which they were unable to fulfil. They re-opened their premises on the 1st November. In the course of the same day, they stopped payment, and forthwith presented their petition to this Court.

It is necessary now to refer to the sections of the Act applicable to the case. Section 47 empowers the Court, amongst other things, to grant an insolvent his personal discharge, or to dismiss his petition, or to adjourn the hearing until a future day, the

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effect of such adjournment being, of course, to postpone the discharge. Section 51 gives power to except particular debts from the order of discharge, for a limited period, upon certain specified grounds. This section is important, first, because it was contended on behalf of the opposing creditor, that certain debts in this case ought to be, under this section, excepted from the discharge, if granted. It is important, secondly, because the Legislature, having stated the considerations which are to lead the Court to suspend the discharge as to particular debts, it follows, I think, that similar considerations, when applicable to debts generally, are good grounds for deferring a discharge under s. 47.

(His Lordship read s. 51, and continued.)

Now, there was some suggestion on the part of the opposing creditor of debts contracted fraudulently. For this charge I see no ground whatever. It was contended that debts had been contracted by means of breaches of trust, and this on several different grounds. The opposing creditor alleges first, that his own debt was of this class. The facts, so far as it is necessary to state them, are as follows: The insolvents acted as agents in this country for the opposing creditor, Mr. Sears, in various matters; and from time to time realised money and made payments on his behalf. On the 19th April Mr. Sears wrote a letter to the insolvents, which they received early in May, instructing them to invest Rs. 40,000 in Municipal Debentures of a specified series, and to place them in the Oriental Bank. By a letter of the 12th June, received early in July, he varied his order so as to include certain other series of the like debentures. By a letter of the 28th July, he further enlarged his order so as to apply to Municipal Debentures of any series. On the 9th October he again wrote, authorising investment in Government Paper. But this letter was only received on the 1st November, the day the insolvents stopped payment. The insolvents bought debentures to the extent of Rs. 18,000. Mr. Sears is a creditor for the balance of his money.

It was argued that there was here breach of trust on several grounds. First, it was said Mr. Sears's money was, from the first, in the hands of the insolvents not as bankers,

but as mere agents; and that they were wrong in mixing that money with their general funds. I do not agree with this view. In the ordinary course of their business, the insolvents stood in the relation of bankers to their constituents, and were not bound to keep their money separate. The fact that they obtained 4 per cent. interest on deposit is conclusive as to this, and I see nothing to take Mr. Sears's case out of the ordinary rule. Secondly, it was argued that, on receipt of the letter of the 19th April, ordering the investment, the insolvents were bound to separate the Rs. 40,000 from their general funds, and keep the sum apart until they could find the desired securities. I do not think a banker, in such circumstances, is under any such obligation. Thirdly, a much more serious charge was made. The reason throughout given by the insolvents for not having carried out Mr. Sears's order was, that, though they did their best, they could not procure Municipal Debentures to so large an extent in the market. On behalf of Mr. Sears I was asked to find that this was a false excuse, and that the real reason was, that the insolvents could not, or would not, pay the money. Mr. David Cowie was examined upon this matter, and I am quite satisfied that the explanation given by him at the time, and now, was the true one. He is, I think, strongly confirmed by the two witnesses called for the opposing creditor, who both said that the debentures could not have been procured in the desired quantity, at any rate without paying more than the market price for them; and in the absence of special rules, I do not think the insolvents would have been justified in paying more than the market price. The charge of breach of trust in respect of Mr. Sears, therefore, in my judgment fails.

The next case in which breach of trust was alleged, was that of a Mrs. Mackertich. The insolvents were trustees of the settlement. As such, they received interest for her shortly before their stoppage, and remitted the amount to her in England by a draft upon Crawford, Colvin, & Co. They at the same time remitted to that firm securities sufficient to cover the draft, but they omitted duly to appropriate the securities to meet the draft. Crawford, Colvin, & Co. dishonored the draft, and applied the securities in reduction of their own claim. Now, the insol-

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vents ought, no doubt, as trustees, to have taken care to appropriate their remittances; but their omission to do so was not, I think, at all the kind of breach of trust pointed to in s. 51, and Mrs. Mackertich does not oppose.

The next charge of breach of trust is somewhat more general. In the list of creditors in the insolvents' schedule, several debts appear as trusts. It was explained that, in some of the cases called trusts, there was really no trust at all. In other cases, the insolvents were not trustees, but only agents for the trustees. There remain some cases of trust proper. In these cases, it is evident from the sums appearing in the schedule, that trust business has been mixed with the general funds of the firm. I heard with great surprise and regret from Mr. David Cowie, that, from the beginning of the century, it has been the practice of his firm, and of the firms which preceded it in business, to mix the incomes raised by them from trust-properties in one common fund with their own moneys. This is a grave breach of duty in trustees, and might, in some circumstances, expose them to very serious consequences, criminal as well as civil. In the present case the aggregate amount of trust-money in the schedule is very small; in some cases, at least, the course taken seems to have had the sanction of the *cestui que trust*. There is no ground for suspecting any intention to defraud, and none of these creditors oppose. I do not think, therefore, the matter is one on which I am bound to act under s. 51.

It further appears that the insolvents have been in the habit of taking out letters of administration to estates in this country under powers-of-attorney from executors and next-of-kin in Europe. Again, I must say I heard with surprise and regret, that (when and so long as the moneys of such estates have been in their hands) it has been their practice to mix them with their own funds. This is a serious breach of the plainest duty of an administrator. An executor or an administrator, who risks the funds of an estate by mixing them with his own, and employs these for his own purposes, even temporarily, is in great danger of criminal as well as civil liability. It has not, however, been shown, that any of the present debts of the insolvents are affected by this consideration.

Another irregularity also appeared in the course of the same examination. The insolvents have been in the habit of charging commission upon estates so administered by them. This is expressly prohibited by s. 56 of Act II of 1874; and I can hardly hope that the insolvents were unaware that they were acting illegally. But this does not affect the question of discharge.

I have now considered all the charges of breach of trust. I have come to the conclusion that none calling for any action on the part of the Court under s. 51 has been established.

It was next contended for the opposing creditor, that recent debts at any rate had been contracted "without having any reasonable or probable expectation at the time when contracted of paying the same." I do not think those words apply. They are pointed, not at the case of a man who incurs a debt knowing that he cannot pay his debts generally, but at that of a man who incurs a debt knowing that he cannot repay that debt. Now, the expectation of the insolvents, no doubt, was, that, as long as they could keep the business going, they would be able each day to meet the claims of the day. It cannot, therefore, I think, be said of any individual debt that it was incurred without expectation of repaying it.

There remain to be considered the words extra of the section—"If it shall appear that the insolvent's whole debts so greatly exceeded his means of providing for the payment thereof during the time when the same were in course of being contracted, reference being had to his actual and expected property, as to show gross misconduct in contracting the same." As to these words, if they apply to the case at all, they apply not to this or that debt or class of debts, but to all the debts contracted for some years past; and, under the circumstances of the case, afford ground, not for excepting any specified debt under s. 51, but for deferring the discharge under s. 47.

I have, therefore, to consider whether the conduct of the insolvents, in carrying on business as they have done, falls within the censure of the words I have just read. With great regret, I am forced to the conclusion that at least from the middle of 1877 it does. If I were compelled to say whether from an

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earlier period, I am afraid I should have had to answer in the affirmative. But, at any rate, in the middle of 1877, these gentlemen knew that they were deeply insolvent; that they had been so for some three years; and that in that time the deficits had increased, not diminished. The business was subject to a steady drain in the form of interest upon the old debts to Crawford, Colvin, & Co. There was then no outside business of any kind carried on by them from which any assistance could be derived. They are not shown to have had any property apart from the business, or any expectation of any in the future. The business was carried on entirely with other people's money, entrusted to them in full confidence of their solvency. It involved, as long as it was carried on, their constantly opening new accounts with fresh constituents, as well as their constantly receiving fresh deposits from old constituents. They made genuine efforts to keep the business alive; for in the years 1876 and 1877, they brought some fresh capital into the business, not enough, however, seriously to affect its condition. But in what hope did they do so? The question was put to Mr. David Cowie, and he answered it with the candour and straightforwardness that marked the whole of his examination. There was no plan for recovering the lost ground, no expectation of relief from any assignable source, but a vague hope that times might improve, business might become more active, and something might occur to save them. They continued to carry on business for more than two years and longer, until they found themselves unable to meet the orders for investment and remittance actually in hand. I am constrained to say that I can see no excuse for their doing so; and I think justice and the interests of commercial morality require that the Court should plainly condemn trading of this character. I cannot, therefore, now grant these gentlemen their discharge, and I adjourn the hearing of this petition for a year till the Court-day in next June.

But though I think these gentlemen ought not at present to obtain their personal discharge, I do not think their creditors could gain anything by their being in the meantime liable to be personally harassed. And upon this point I think I am at liberty to note the fact that there is only one opposing creditor.

The *interim* protection already granted will, in the meantime, be continued.

Discharge postponed.

Attorneys for the insolvents: Messrs. *Roberts, Morgan, & Co.*

Attorneys for the opposing creditor: Messrs. *Carruthers and Jennings.*

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ORIGINAL CIVIL.

Before Mr. Justice Wilson.

RAMLALL AGARWALLAH v. MOONIA BIBEE AND OTHERS.

1880
July 12.

Practice—Attorney and Client—Application to restrain Attorney changing sides.

An attorney who has acted for a party to a suit, and has discharged himself, cannot afterwards act for the opposite party; and the Court will restrain him from doing so on an application made for that purpose.

Earl Cholmondeley v. Lord Clinton (1) followed.

THIS was an application made on behalf of the defendants (on notice to Messrs Wheeler and Sowton and to the plaintiff) for an order restraining the plaintiff from engaging or appointing Messrs. Wheeler and Sowton, or either of them, as his attorneys, and also for an order restraining Messrs. Wheeler and Sowton or either of them from acting as attorney or attorneys on behalf of the plaintiff, and from communicating to the plaintiff or his agents any information in the matter in dispute in the suit, which had come to the knowledge of Mr. Wheeler whilst he was a partner in the firm of Pittar and Wheeler.

The facts of the case, as disclosed by the affidavits on either side, were as follows:—

In 1873 the suit of Pertub Chunder Khandelwal v. Kailowall Sett and others was instituted, for the administration of the estate of one Sew Churn Dutt, deceased; and a decree obtained on the 22nd November 1876, ordering accounts to be filed and taken; and on the 20th March 1878 the Court ordered the inves-

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tigation of accounts to be referred to the assistant clerk of the Court. In such suit the defendants were represented by Mr. Pittar as their attorney. In 1877 Mr. Wheeler joined Mr. Pittar in business, the firm being known as "Pittar and Wheeler," (Mr. Pittar's name was, however, alone on the record as the defendants' attorney). The defendants alleged that, from 1877, the entire management of the suit was undertaken by Mr. Wheeler up to December 1879, when the firm of Pittar and Wheeler was dissolved. Mr. Wheeler, however, in his affidavit, whilst admitting that he had regularly attended before the assistant clerk of the Court at the investigation of the accounts under the order of the 2nd March 1878, denied that he had received any further instructions from the defendants or his partner other than that he was to uphold the accounts as filed; and further denied, that, his acting as attorney for the plaintiff would prejudice the case of the defendants, as he had received no information from the defendants, which, if disclosed, could affect their case in any way. On the 5th June 1880, the plaintiff assigned over his interest in the decree to one Ramlall Agarwallah, and the latter obtained an order substituting his name for that of the original plaintiff on the record, and appointed Messrs. Wheeler and Sowton as his attorneys. Several letters passed between Mr. Pittar and Messrs. Wheeler and Sowton, regarding the latter firm's acting as attorneys for the plaintiff, after Mr. Wheeler had, whilst in the firm of Pittar and Wheeler, acted for the defendants; but as no change in the plaintiff's attorney took place, the defendants made the present application to the Court to restrain him from so acting.

Mr. Hill (with him Mr. Trevelyan) for the applicants. The case of *Earl Cholmondeley v. Lord Clinton* (1) is here applicable. It was there decided that an attorney cannot give up his client and act for the opposite party, the only distinction between that case and the present being that Montriau had formerly been an articled clerk in the firm of the defendants' attorney, and had then, and subsequently, when a partner in the firm, obtained information regarding defendants' case, which, it was said, would be prejudicial to the defendants, if he were not restrained from

acting as attorney to the plaintiff (Montriau having subsequently set up in business for himself); whereas in the present case Wheeler had been a partner in the firm of defendants' attorney, and had subsequently set up business in a new firm. The question is,—can Wheeler, after discharging himself from the relation of attorney for the defendants, become attorney for the plaintiff. He is not in the position of an attorney discharged by a client, and therefore, according to the case of *Earl Cholmondeley v. Lord Clinton* (1), cannot become the attorney of the plaintiff. With regard to Sowton, the rule, that instruction to one partner implies instruction to the other, should be applied. The doctrine of constructive notice should apply.

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Mr. Phillips on behalf of Wheeler.—No knowledge of information on the part of my client likely to be injurious to the defendants is disclosed by the facts set out in the affidavit. No general rule has been laid down in the case of *Earl Cholmondeley v. Lord Clinton* (1). The real point is, whether the discharge is optional or compulsory.—Upon what principle does the question stand? [WILSON, J.—Does not the matter rest upon the broad principle, that an attorney cannot change sides?] The distinction between this case and that of *Earl Cholmondeley and Lord Clinton* (1) is that, in the latter there were facts regarding the title of Clinton, which had been disclosed to Montriau. *Bricheno v. Thorp* (2) lays down, that a clerk to an attorney commencing business for himself is not to be restrained from acting as attorney for parties against whom his master was employed, upon general allegations of his having, in his former service, acquired information likely to be prejudicial to the clients of his master. The allegations here in the defendants' affidavits are very general. [WILSON, J.—In that case the man was a clerk and not a partner.] The defendants have not sought to retain Wheeler; they are content with Pittar. This throws the onus on them to show the injury that will accrue. Wheeler's name is not even on the record as attorney for the defendants.

Mr. R. Allen on behalf of Sowton.—There are no allegations in the affidavits against my client, except that he is in partnership

(1) 19 Ves., 261.

(2) 1 Jacob, 300.

1880. with Wheeler. [WILSON, J.—Assuming it is wrong for one partner to act, how can it be right for the firm to do so.] I am
 RAMLALL aware that the case of *Davies v. Clough* (1) goes that length,
 AGAR- and I shall, therefore, argue the case generally. The Court will
 WALLA not in general restrain an attorney from acting for the opposite
 MOONIA side, unless the change was procured by his own act; and some
 BIBEE. confidential communication has been made to him by his former client: 1 Archibald on Practice, 94. *Johnson v. Marriott* (2) lays down, that the affidavits must disclose that the person whom it is sought to restrain is possessed of information likely to be prejudicial to the other side. The true rule seems to be, that, where an attorney voluntarily discharges himself, and has knowledge of facts injurious to his old client, he cannot then act for the other side. This has not been shown in the present case.

Mr. Bonnerjee for the plaintiff.—I object to the order being made, and am willing that Wheeler should act for me; no grounds have been made out for restraining him from acting. The suit is an administration suit, and has merely come before the assistant clerk on the question of accounts, and Wheeler can have obtained no information during the investigation of accounts which is injurious to the defendants. The case of *Earl Cholmondeley v. Lord Clinton* (3) has been cut down by *Bricheno v. Thorp* (4) and *Beer v. Ward* (5). *Robinson v. Mullett* (6) shows, that the case of *Earl Cholmondeley* amounts to this,—that it must be shown that the person to be restrained is in possession of information injurious to the other side. Wheeler was not retained for the defendants, his name is not on the record; if the defendants had wished to change attorneys, would it have been necessary to have served notice on Wheeler?

Mr. Hill in reply.—Wheeler, on entering into partnership with Pittar, took upon himself all duties to clients which Pittar had previously undertaken. The clients not objecting to Wheeler's taking up the case after he became a partner, Wheeler must be taken to be engaged by the client for the purposes of this suit.

(1) 8 Sim., 262.

(4) 1 Jacob, 300.

(2) 2 Cr. and M., 183.

(5) *Id.*, 77.

(3) 19 Ves., 261.

(6) 4 Price, 353.

The judgment was delivered by

WILSON, J.—I consider it unnecessary to go into the facts, but upon the broad principle of law, laid down in the case of *Earl Cholmondeley v. Lord Clinton* (1), viz., that an attorney having discharged his client cannot change sides, I will not enter into or decide the motion on the facts as stated in the affidavits. I feel myself bound to follow the ruling laid down in the case cited. I thought it would be for the benefit of the profession, that attorneys should know clearly what cases they were entitled to take up. Mr Wheeler having admitted that he took an active part in the conduct of the defendants' case, I consider that the defendants are entitled to the order asked for; but in granting the application I wish it to be understood, that I have not entered into a discussion of the facts of the present case, and have refrained from any consideration of the question as to which of the parties to the application would be most prejudiced by my order. I would, therefore, simply decide the matter upon the point of law laid down in the case cited by Mr. Hill.

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Application granted.

Attorney for the plaintiff Messrs *Wheeler and Sowton*

Attorney for the defendants Mr *Pittar*

APPELLATE CRIMINAL.

Before Mr Justice Jackson and Mr Justice Tottenham

IN THE MATTER OF THE PETITION OF QUIROS AND ANOTHER *

THE EMPRESS v. ALLEN AND OTHERS.

1880
June 15.

*Privilege—Waiver—European British Subject—Criminal Procedure Code
(Act X of 1872), ss. 82 and 84.*

Section 84 of the Criminal Procedure Code must be construed strictly with s. 72, and before a European British subject can be considered to have

* Criminal Motion, No. 116 of 1880, against the order of Charles P. Caspers, Esq., Assistant Magistrate of Raneegunge, dated the 18th May 1880.

(1) 19 Ves., 261.

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waived the privilege conferred upon him by s. 72, it must appear that his rights under that section have been distinctly made known to him, and that he must have been enabled to exercise his choice and judgment whether he would or would not claim those rights.

The provisions of s. 72 of the Code of Criminal Procedure relating to the kind of Court which shall have jurisdiction and shall not have jurisdiction to enquire into a complaint or try a charge against a European British subject, constitute a privilege,—that is to say, they are not so much words taking away jurisdiction entirely, as words which confer on the British subject a right to be tried by a certain class of Magistrates and by no others, which right the Code enables him to give up.

No person can by waiver or consent enable a Magistrate or a Judge to try a case which he is disqualified to try by some circumstance not personal to the accused.

The Queen v. Bholanath Sen (1) distinguished.

The waiver of privilege spoken of in s. 84 must be an absolute giving up of all the rights, with reference to chap. vii of the Code of Criminal Procedure, which a European British subject has; and the words 'dealt with as such before the Magistrate' mean everything contained in the chapter,—that is to say, the tribunal having cognizance of the case, the procedure, and also the punishment to which the accused would be liable.

THE facts of this case were as follows :—Quiros and Maunders and several others, all European British subjects, were, on the 18th May 1880, charged with rioting and violence before an Assistant Magistrate vested with the powers of a Magistrate of the second class only. The Assistant Magistrate was aware that, as European British subjects, the persons charged before him were, under s. 72, triable only by a Magistrate of the first class, who was also a Justice of the Peace, and not by him; and, accordingly, before putting them on trial, asked each of them whether he had any objection to be tried before him, a Magistrate of the second class. It did not, however, appear that he informed them that, under s. 72, he had no jurisdiction to try the case, and that they were triable only by a Magistrate of a higher grade. Each of the accused said, that he had no objection to the Assistant Magistrate hearing the case, and the trial, accordingly, proceeded, and terminated in the conviction of all the accused. Quiros and Maunders received sentences of two and one month's rigorous imprisonment respectively, and the others were fined.

(1) I. L. R., 2 Cal., 23.

Quiros and Maunders then applied to the High Court to quash the entire proceedings, on the ground that, under s. 72, the Assistant Magistrate, having only second class powers, had no jurisdiction to try European British subjects.

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Mr. *Piffard* appeared for the petitioners.

No one appeared for the Crown.

Mr. *Piffard*.—The provisions of s. 72 point out clearly the officers who are to have jurisdiction over European British subjects. The Magistrate in this case had no jurisdiction. [JACKSON, J.—Your clients have waived their privilege; they cannot now say that the Magistrate had no jurisdiction.] Section 72 does not confer a privilege which can be waived so as to give jurisdiction. Consent cannot give jurisdiction—*Foy's case* (1). [JACKSON, J.—That case was decided before the Criminal Procedure Code was passed. Does not s. 84 afford a complete answer to your present contention?] I submit not. The principle that consent cannot give jurisdiction is one that has governed the Courts for years. The Legislature has not abolished the principle; it has merely said, that if the claim is not made, the person charged “shall be held to have waived his privilege as such British subject.” It has not defined the consequence of such waiver, nor said that waiver shall create jurisdiction, and if it had intended to do so, apt words would have been used. [JACKSON, J.—If the words ‘waived his privilege’ do not mean that the Court in which he might have pleaded his privilege shall have power to try him, what do they mean?] Under ordinary circumstances, if a Magistrate tries a person without jurisdiction and sentences and imprisons him, he may be liable to a suit for damages for false imprisonment, and the object of the Legislature was to protect a Magistrate from such consequences—*The Queen v. Bholanath Sen* (2). If consent can validate a conviction, it must also validate an acquittal. Suppose the case of a man waiving his right to be tried by a higher tribunal in order to be tried before a friend, and he is acquitted, or convicted and

(1) 1 Tay. & Bell, 219.

(2) I. L. R., 2 Calc., 23.

1880 slightly punished, could he plead such acquittal or conviction
 IN THE in bar of further proceedings against him?
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JACKSON, J.—We are of opinion that the provisions of s. 72 of the Code of Criminal Procedure relating to the kind of Court which shall have jurisdiction and shall not have jurisdiction to enquire into a complaint or try a charge against a European British subject, do in fact constitute a privilege,—that is to say, that they are not so much words taking away entirely jurisdiction, as words which confer on the British subject a right to be tried by a certain class of Magistrates, and by no others, which right the Code enables him to give up. It appears to us that that is the only view of the section which is compatible with a reasonable construction of s. 84. We have had cited to us a case with which we are of course familiar—the case of *Foy* (1), in which judgment was given by Sir L. Peel, and a more recent case before Mr. Justice Macpherson and Mr. Justice Morris—*The Queen v. Bholanath Sen* (2). The case of *Foy* it appears to me unnecessary to mention at present, because the state of the law and the state of the jurisdiction under which that case was decided was altogether different, and has in fact passed away. In regard to the judgment delivered by Macpherson, J., I entirely concur in it, and for this reason, that there is nothing in the Code of Criminal Procedure—and I apprehend there never could be any provision—which would enable an accused person to waive an objection to jurisdiction which was not personal to himself,—that is to say, no person could by waiver or consent enable a Magistrate or a Judge to try a case which he is disqualified to try, by some circumstances not personal to the accused. That was the case in the matter before Mr. Justice Macpherson. There it was alleged that, of the three Magistrates who constituted the bench, one—the presiding Magistrate—was the virtual prosecutor, and another had himself a personal and pecuniary interest in the case, and therefore no consent of the prisoner

(1) 1 Tay. and Bell, 219.

(2) L. L. R., 2 Calc., 23.

could get over these disqualifications. As to s. 84, the language is peculiar; it does not declare that a European British subject may waive his privilege, but it provides that if a European British subject does not claim to be dealt with as such before the Magistrate before whom he is tried or committed, he shall be held to have waived his privilege as such European British subject. Mr. Piffard suggested to us that the meaning of the words 'waive his privilege' in that section is, that the accused, while retaining all his rights as to want of jurisdiction, which s. 72 confers, so that he could not be tried except by a particular Court or Magistrate, might yet deprive himself of the right to bring an action for damages. It appears to us, that that is not a reasonable construction. We do not think that the Legislature could have meant that a person might be tried or committed by a Magistrate whose act in so trying or committing him would be altogether invalid, so that such act could be immediately got rid of by application to the proper Court, but that the accused by waiver should protect the Magistrate so that no action would afterwards lie for damages. It appears to us that the waiver of the privilege spoken of must be an absolute giving up of all the rights with reference to this chapter of the Code of Criminal Procedure which a European British subject has; and the words 'dealt with before the Magistrate' mean everything contained in this chapter,—that is to say, the tribunal having cognizance of the case, the procedure, and also the punishment to which he would be liable.

But then we are also of opinion that s. 84 must be construed strictly with s. 72, and that we must read them as if they were connected together by the word 'but,'—that is to say: "No Magistrate shall have jurisdiction to enquire into a complaint or try a charge against a European British subject unless he is a Magistrate of the first class, *but* if a European British subject does not claim to be dealt with as such before the Magistrate before whom he is tried or committed, he shall be held to have waived his privilege." And clearly we think that, before a European British subject can be considered to have waived the privilege conferred upon him by s. 72, it must appear that his rights under that section have been distinctly

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made known to him, and that he must have been enabled to exercise his choice and judgment whether he would or would not claim those rights. Now, in the case before us, for anything that appears to the contrary, the question put to the accused may simply have been whether they had any personal objection to Mr. Casperz as Magistrate to try them. The answer naturally would be, "We have no objection to be tried by Mr. Casperz." But if the question had been—"You stand here as European British subjects, which I know you to be, and as such British subjects you have the right to claim that you should not be tried except by Magistrates of a certain class to which class I do not belong. Do you claim that right or not?" The answer might have been quite different, and it would be entirely for them to choose whether they would avail themselves of that privilege or not. It does not appear that any such question was put to them in the present case, and therefore we think the proceedings before the Assistant Magistrate were bad, and the conviction must be quashed.

Application has been made by Mr. Piffard that this judgment might apply to the case of two other prisoners who have been also convicted, but who are not petitioners before us. We think that Mr. Casperz should be called upon to state whether, in point of fact, the provisions of the Code of Criminal Procedure were made known to those two prisoners.

Conviction set aside.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

1880
June 15.

IN THE MATTER OF THE PETITION OF SURJANARAIN DASS AND OTHERS.
THE EMPRESS ON THE PROSECUTION OF D. R. DALY v. SURJANARAIN
DASS AND OTHERS.*

Order by Executive Officer—Power of Judicial Courts to question the legality of such order.

Where an executive officer makes an order or issues a notification under the provisions of the Code of Criminal Procedure, it is not within the province of judicial authority to question the propriety or legality of such order

* Criminal Motion, No. 87 of 1880, against the order of Baboo Ishan Chunder Potronovis, Extra Assistant Commissioner of Sylhet, dated 23rd of December 1879.

or notification until an attempt is made to enforce the exaction of a penalty against a person committing a breach of such order or notification. It then becomes the duty of the judicial authority to consider whether the order is properly made or not.

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Mr. M. Ghose and Baboo Durga Mohun Dass for the petitioners.

Mr. Kilby for the Crown.

THE facts of this case sufficiently appear in the judgment of the Court (JACKSON and TOTTENHAM, JJ.), which was delivered by

JACKSON, J.—We are altogether unable to approve of the decision of the Sessions Judge in this case, as it appears to us that he has missed the true points in the case, and has given prominence—and given, so to say, by his judgment a certain validity—to that which he ought to have discountenanced.

As we understand the statements of the contending parties, the Maharaja of Tippera claimed a right to collect certain duties, of which the nature is not precisely stated, in respect of bamboos cut not only over land admittedly belonging to him, but over land of which the ownership appears to be in doubt, and of which at any rate the Collector of Sylhet appears to have made a grant to the opposing parties in these proceedings. Whether upon application from the grantee or otherwise, the Deputy Commissioner, as Collector, appears to have taken upon himself to issue a proclamation to all persons concerned, warning them that the collection of duties or tolls on the part of the Maharaja was illegal. Notwithstanding the issue of that proclamation, the people of the Maharaja appear to have made a further demand of tolls which was resisted by the Collector's grantee, and thence a dispute arose; and the result of that was, that certain persons were convicted in the Court of the Extra Assistant Commissioner, and sentenced to rigorous imprisonment and fine. These persons appealed to the Sessions Judge, and the Sessions Judge, in our opinion very strangely, says:—
“So long as the order of the Deputy Commissioner stands, and until it has been set aside, these appellants have no right to dis-

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obey the order of the Deputy Commissioner, and to take the law into their own hands. It is not for this Court to form an opinion of the legality or the illegality of the order of the Deputy Commissioner. The employers of these appellants have their remedy by suit or otherwise." This declaration of the Sessions Judge would seem to justify the doctrine, that any public servant, with or without authority, is at liberty to issue any notification which seems good to him, and that any person committing an act contravening such notification is liable to be punished. The Judge goes on to say :—" The evidence for the prosecution proves that these appellants did illegally assemble." Now, except in so far as the assembly was in contravention of the Deputy Commissioner's proclamation, it does not appear to have been illegal at all. Further on the Judge says :—" The order of the Deputy Commissioner has clearly made over to the Chowtully Garden managers the sole right to the south side of the Sawal Charra, and forbade the Maharaja of Tippera and his people to make any collections." This is a view of the functions of the Deputy Commissioner very much wider than anything that my previous experience has made me acquainted with. When the Code of Criminal Procedure authorizes the making of orders by executive authorities with the view of preventing a breach of the peace or for similar purposes, it has always been held, and is now enacted in the existing Code, that the propriety of such orders is not a matter of question in that state of things for the appellate judicial authorities. It is when the executive officers seek to enforce those orders by the infliction of penalties that the Courts have to step in and see whether the orders made were with authority or not. This was precisely the occasion on which it was the duty of the Sessions Judge to consider whether that order was properly made or not. The order of the Sessions Judge, upon the ground on which it is based, cannot be supported. It, no doubt, remains to be considered, and it has not been considered, whether the agents of the Maharaja of Tippera or his farmer did, with a view to enforce any right or supposed right, commit any act which comes within the purview of s. 141 of the Indian Penal Code, and for which, therefore, they are properly punishable. That

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is a question which the Sessions Judge ought to inquire into, and with a view to the consideration of which this case must go back. There can be no doubt, we think, that if the Maharaja has been accustomed to levy these duties or tolls or whatever they are called, and attempted on the present occasion to levy them from the persons from whom they are due, that would be an "attempt to enforce a right or supposed right."

Case remanded.

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Mitter.

**SHEO CHURUN SINGH (DEFENDANT) v. FAKERA DOOBAY AND
OTHERS (PLAINTIFFS).***

1880
June 8.

Res judicata—Intervenors—Rights as between original Defendant and Intervenors—Suit for Possession.

Where a plaintiff claimed certain property, and two persons intervened and were allowed to put in their claim to a portion of it, which claim at the hearing, the intervenors, however, refrained from pressing, and the suit was decided in favor of the plaintiff, the original defendant alone appealing (unsuccessfully) against the decree—

Held, that it was not open to the intervenors to institute any fresh proceedings to obtain the property against the original defendant; the decree in the suit in which they intervened being conclusive as between them and such defendant.

Sivagnana Tevar v. Periasami Tevar (1) distinguished.

THIS was a suit brought by one Fakera Doobay and others against Sheo Churun Singh to recover possession of certain lands, in which suit two persons desired and were allowed to come in as intervenors, claiming a portion of the property in question. At the hearings before the lower Courts, the intervenors did not press their claim, and the suit was decided in favor of

* Appeal from Appellate Decree, No. 200 of 1879, against the decree of J. R. Richardson, Esq., Judge of Tirhoot, dated the 23rd September 1878, affirming the decree of Baboo Ram Prasad, Second Subordinate Judge of that district, dated the 12th June 1877.

(1) I. L. R., 1 Mad., 312; S. C., L. R., 5 I. A., 61.

1880 the plaintiffs; the Munsif, however, incidentally remarked that as
 SHRO between the intervening defendants and the plaintiffs it was
 CHURUN immaterial who succeeded, as the former could bring a suit at
 SINGH some future time to establish their claim. The original
 v. defendant alone appealed to the District Judge, and his appeal
 FAKERA was dismissed.
 DOOBAY.

The same defendant thereupon appealed to the High Court.

Baboo *Hurry Mohun Chuckerbutty* and Baboo *Judunath Sahai*, for the appellant, set up the right of the intervenors, and contended, that the decree of the lower Court, giving the whole property to the plaintiffs, ought not to be confirmed, citing *Sivagnana Tevar v. Periasami Tevar* (1).

Baboo *Mohesh Chunder Chowdhry* for the respondents.

The judgment of the Court (GARTH, C. J., and MITTER, J.), so far as it affected the point under report, was as follows:—

GARTH, C. J.—The present appellant says, that these intervening defendants may at some future time make a claim for their shares of the property as against him, and that, as long as there is any uncertainty as to their title, it would not be right for us to confirm the decree of the Court below giving the whole property to the plaintiffs. In support of this argument we are referred to the case of *Sivagnana Tevar Periasami Tevar* (1) decided by the Privy Council.

That case appears to us to be totally different from the present. There the parties, who were said to be entitled to the property as against the plaintiff, were not made parties to the suit; and the High Court, although there was good reason for supposing that those persons were really entitled, declined to try the question whether they were entitled or not, considering that, as between the plaintiff and those persons, the question of title might be settled in another suit.

The Privy Council, however, held that this was wrong. They considered that the plaintiff must succeed, if at all, upon the strength of his own title, and that as three other persons were not made parties to the suit (as they ought to have been), they

(1) 1 L. R., 1 Mad., 312; S. C., L. R., 5 I. A., 61.

might in some future suit recover mesne profits, not only as against the plaintiff, but as against the defendants, who were *bond fide* purchasers for value, and had been in possession for many years.

But that is by no means the state of things here, because (for the purposes of this argument) it is admitted that all the claimants of the property are before the Court.

The plaintiffs claim the whole property, and the intervening defendants have been allowed to come in and prove their title to any part of it.

Having had this opportunity, they have not thought fit to press their case in the Courts below or to appeal to this Court. Consequently, the defendant who is now appealing is in no danger whatever of being sued by those two persons, because, as between him and them, the decree which has been given will be conclusive.

It is true that in this case the lower Courts have unfortunately said, that, as between the intervening defendants and the plaintiffs, it does not matter which is entitled, because the intervening defendants may at some future time recover their shares as against the plaintiffs. It may be that, by these observations of the lower Courts, the intervening defendants may have been induced not to press their case or to appeal as they otherwise would have done, and it is possible that if they should sue the plaintiffs at some future time they may find themselves in a difficulty; but that consideration does not affect the case of the defendant who is now appealing, as, between him and the intervening defendants, the decree in this case will be a conclusive bar.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

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SHIBU
CHUNDER
SINGH
v.
FAKERA
DOORAY.

SMALL CAUSE COURT REFERENCE.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Mitter.

1880
May, 26.

NOBOCOOMAR MOOKHOPADHAYA v. SIRU MULLICK.*

Limitation Act (XV of 1877), sched. ii, arts. 66 and 116—Registered Bond—Compensation for Breach of Contract.

A suit to recover money due upon a registered bond is a suit for compensation for breach of contract in writing registered, within the meaning of art. 116 of sched. ii to Act XV of 1877, and must be brought within six years from the time when the period of limitation would begin to run against a suit brought on a similar contract not registered.

THIS was a suit to recover principal and interest due on a registered bond. The execution of the bond was admitted by the defendant, who pleaded that the suit was barred by 'limitation under art. 66 of sched. ii, Act XV of 1877, which provides a period of three years' limitation for a suit on a single bond, where a day is specified for payment, from the day so specified. The plaintiff contended that the case was governed by art. 116 of sched. ii of the Act, as being a suit for compensation for the breach of a contract in writing registered, the period of limitation for which is six years from the time when the period of limitation would begin to run against a suit brought on a similar contract not registered. The Judge of the Small Cause Court at Chooadanga gave the plaintiff a decree subject to the opinion of the High Court.

No one appeared to argue the point.

The judgments of the Court (GARTH, C. J., and MITTER, J.) were as follow :—

GARTH, C. J.—I confess that I have considerable doubt as to the correctness of the judgment of the Court below; but as my learned colleague thinks that the judgment is right, and as I find

* Reference No. 4 of 1880, from Baboo Bolloram Mullick, B.L., Officiating Judge of the Court of Small Causes at Chooadanga, dated the 2nd February 1880.

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that, on the Original Side of the Court, it has been held by Mr. Justice Wilson that, under the Act of 1877, six years is the proper period of limitation in the case of a registered bond, I am unwilling, where the meaning of the Legislature is really doubtful, to divide the Court upon a question of limitation.

In one sense, of course, every suit for a breach of contract is a suit for compensation; but I should have thought that, in ordinary legal parlance, a suit to recover money due upon a bond (especially having regard to the form of a single bond in this country), would be a suit for a debt or sum certain; whilst on the other hand, a suit for compensation for breach of contract (art. 116), meant a suit for unliquidated damages.

But there is no doubt that, under the Acts of 1859 and 1871, the period of limitation in the case of a bond, or other contract in writing registered, was six years; and that the people of this country have for years past understood that an unregistered bond must be sued upon within three years, and a registered bond within six years.

Unless, therefore, it appears clear from the Act of 1877, that the Legislature intended to change the period of limitation from six to three years in the case of a registered bond, I think that it would be unfair to persons placed in the position of the plaintiff to oblige them to sue within the shorter period; and as not only the Judge in the Court below, but also learned Judges of this Court, have satisfied themselves that a suit upon a bond is, properly speaking, a suit for compensation for breach of contract, I do not think it right, in the interests of justice, to press the opposite view.

MITTER, J.—I am of opinion that the plaintiff's claim in this case is not barred by limitation. I think the case comes within the art. 116 of the 2nd schedule of the Limitation Act of 1877. The article 66 is not applicable. It is true that the suit is "on a single bond where a day is specified for payment," but the bond, the basis of the suit, being registered, and the claim (for reasons which I shall presently state), being for compensation for the breach of the stipulated condition of payment, the suit falls under the art. 116. In this article, under the head "time from which period begins to run," it is enacted that "the

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period of limitation would begin to run against a suit brought on a similar contract not registered." Having regard to the words, "a similar contract not registered," it seems to me that a suit for compensation for the breach of the condition of a contract of the nature described in art. 66 would fall under art. 116 or 66, respectively, according as the contract is registered or unregistered.

It seems to me that, when a party to a contract commits a breach of its conditions, the aggrieved party has either of the two alternative civil remedies: he may either bring a suit for specific performance or for compensation. A suit for specific performance, by reason of the specified time for payment having already elapsed, has become impossible in this case.

This suit, therefore, falls under art. 116, and is not barred.

APPELLATE CRIMINAL.

Before Mr. Justice Morris and Mr. Justice Prinsep.

1880
 June 24.

HOSSEIN BUKSH AND OTHERS v. THE EMPRESS.*

Charges, distinct and separate, tried simultaneously by a Jury—Parties opposed in rioting—Consent by Pleaders on behalf of Accused to irregular Procedure—Examination of Accused by Sessions Judge—Code of Criminal Procedure (Act X of 1872), ss. 243, 250, 264, 265.

Members of two opposing parties in a riot were, under two distinct commitments, sent up for trial before the Sessions Judge and a jury. After the close of the case for the prosecution in one of these cases, the Sessions Judge, with the consent of the pleaders representing the accused, postponed the taking of the evidence for the defence, and proceeded to examine the witnesses for the prosecution in the counter-case before the same Jury. The Court then took the evidence of the witnesses for the defence in the first, and in the counter-case in the order named, and after hearing the address of the various pleaders for the defence and the reply of the Government Pleader, proceeded to sum up the facts in both cases to the jury, who returned a verdict in respect of all the accused. *Held*, that the procedure resorted to by the Judge was a practi-

* Criminal Appeals, Nos. 266 and 324 of 1880, against the order of J. P. Grant, Esq., Sessions Judge of Hooghly, dated the 30th February 1880.

cal violation of the salutary rule which necessitated the keeping of trials in such cases distinctly separate, and that its adoption having materially prejudiced the interests of the accused, the convictions should be set aside.

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Queen v. Sheikh Bazu (1) distinguished.

Held further, that the defect in the procedure could not be cured by the consent of the pleaders for the defence to the arrangement suggested by the Court.

The authority given to a Sessions Court to examine an accused does not contemplate the cross-examination of such accused, nor can the Judge endeavour, by a series of searching questions, to force the accused to criminate himself. The real object involved in the power given to the Court under s. 250 of the Code of Criminal Procedure is to enable the Judge to ascertain from time to time from the accused (especially if he be undefended) such explanation as he may desire to give regarding any statement made by the witnesses, or, at the close of the case for the prosecution, to elicit from the accused how he proposes to meet such portions of the evidence which, in the opinion of the Court, implicates the accused in the commission of the offence with which he stands charged.

Baboo Gopee Nath Mookerjee and *Mr. Sandel* for the accused.

THE facts of this case sufficiently appear in the judgment of the Court (MORRIS and PRINSEP, JJ.), which was delivered by

PRINSEP, J.—In an attempt made by certain villagers of Juggernathpore to remove an obstruction to the flow of water erected by the villagers of Sikundarpore, a riot took place, in which Shariutoollah, one of the Juggernathpore people, was killed.

In accordance with the procedure which has been prescribed in such cases by numerous rulings of this Court, the Magistrate held separate proceedings against each party, keeping the evidence against them separate, and he committed the contending villagers for trial by the Court of Session in separate cases.

The case against the Sikundarpore villagers first came on for trial. After the close of the evidence for the prosecution (so the Sessions Judge records), by arrangement with "the pleaders, the case for the defence in the present trial was postponed till after the conclusion of the case for the prosecution in the counter-trial,"—i. e., the case against the Juggernathpore villagers. The

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trial of the case last mentioned then commenced. "The Judge required the same jury, as were then sitting on the counter-case, *i. e.*, the case against the Sikundarpore villagers,—to sit on the present trial. The pleaders for the prosecution and for the defence in both cases had suggested this course." After the close of the evidence for the prosecution in this case, the Sessions Judge returned to the first case, and took the evidence for the defence. He then took the evidence for the defence in the second case. The pleaders for the defence addressed the Court in both cases. The Government pleader for the prosecution in both cases replied. The Sessions Judge delivered a written summing up in both cases simultaneously, and then received and recorded the verdict of the jury, convicting all the prisoners in both cases. The prisoners were, accordingly, sentenced, and they have now appealed to this Court.

The objection taken in both appeals is the same, that the prisoners have been prejudiced by the manner in which the two cases have been virtually tried together. Before dealing with this objection we feel bound to say that the mode of trial adopted by the Sessions Judge is quite opposed to that which, for many years past, has been pursued in cases where the members of opposing factions are charged with rioting. The very salutary rule which requires that in such cases each party should be tried separately has here been practically violated by the procedure adopted by the Sessions Judge. It is true that the Sessions Judge has so far complied with this rule as to take evidence and record the defences of the accused person in each case; but, looking at the procedure which has been already described, we cannot, in any sense of the term, regard these as two separate trials. They are certainly not distinct from one another, because the two trials were not only held before the same jury, but they proceeded almost in parallel lines, until they united in the addresses of the pleaders engaged and in the Session Judge's summing up. There is no authority of law for such a procedure. But it is suggested that the prisoners cannot plead that they have been prejudiced, because this mode of trial was adopted at the suggestion, and with the consent, of the pleaders engaged. We cannot, however, accept this suggestion, for, as pointed out

by Macpherson, J., in the case of *Queen v. Bholanath Sen* (1), when criminal proceedings are substantially bad in themselves, the defect will not be cured by any waiver or consent of the accused or (we would add in the present cases), of the pleaders for the accused. The arrangement, as the Sessions Judge terms it, seems to have been adopted for the convenience of the pleaders themselves, and from a narrow, but we think a mistaken, view on their part that it would benefit their clients. As for the prisoners themselves, we cannot suppose that they had any voice or understanding in the matter.

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We will now proceed to consider the effect of the procedure adopted in the several stages of each case, as regards the position of the several prisoners.

The law (s. 265, Code of Criminal Procedure) declares, that the "same jury may try as many accused persons successively as to the Court seems fit."

By this we understand that one trial is to follow the other,—that is, that, on the conclusion of one trial, the same jury may proceed to try the accused in the next case. The law does not contemplate that two trials shall be conducted piecemeal in such a manner that at their conclusion the jury shall be called upon to decide at one and the same time upon two distinct classes of evidence which, though they have points in common, require careful discrimination as bearing upon the guilt or innocence of two sets of accused. Independently of the irregularity of the proceeding, no jury ought, we think, to be placed in such an embarrassing position. It is only fair to the prisoners that the sole issues on which they are to be tried and the evidence bearing upon those issues should be laid before the jury, and that the minds of the jury should not be encumbered by the consideration of foreign and irrelevant matter.

These considerations do not appear to have been present to the minds of the pleaders of the different accused when they consented to the arrangement to which the Judge refers. But, as already pointed out, this consent on their part cannot prevent the prisoners showing on appeal that they have been materially prejudiced by the course adopted. It is apparent

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that the prisoners accused in the second case had not the full benefit of s. 243,—that is, of challenging the jurors who were to try them. Who can doubt that, if the first case, which was that of the Sikundarpore accused, had been tried out and resulted in an acquittal, the Juggernathpore accused would have at once challenged all the jurors on the ground that they were not likely to address themselves to the case, as it affected them, with impartial and unbiased minds? So also, the Sikundarpore people might justly complain that, though they had the right of challenge before their own trial commenced, they could have no right to object to the trial by the same jury of the second case, notwithstanding that they might be seriously prejudiced by evidence given in that case criminating them behind their backs, and without their having an opportunity of cross-examination.

It has been argued that the Sessions Judge has power under the law to adjourn a trial, and that, consequently, it was not illegal on his part to commence the second trial before the conclusion of the first. But, according to s. 264, the Court can only adjourn the trial if it “considers that such adjournment is proper and will promote the ends of justice.” No reason for the adjournment in turn of each trial has been stated. From the terms of the Sessions Judge’s summing up, it would seem that the “arrangement” was suggested by himself, or by the Government Prosecutor, for he states that it was acquiesced in by the pleaders for the defence in both the cases. In our opinion the adjournments were neither proper, nor likely to promote the ends of justice. But even admitting that, under some circumstances, a second case may be tried by the same jury during the pendency of the first trial, it by no means follows (and this constitutes a very grave objection) that the two cases should be summed up together and decided simultaneously.

The Sessions Judge, in the commencement of his summing up, has himself indicated this objection to the procedure adopted by him. He tells the jury that “the evidence for the prosecution in one case is practically that for the defence in the other, though a special defence has been made in each case.” The Judge, no doubt, felt the difficulty in which the jury were placed, for he

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states, "I proceed to sum up the evidence in both cases on this single charge, in which, however, I will do my best to keep each case and the evidence proper to it singly before you." We recognize the Sessions Judge's endeavours to do his duty in this respect, but he seems to have lost sight of the fact that some of the prisoners in each case were examined as witnesses in the other; and that, under such circumstances, it was impossible to expect that the jury should be able to separate in their minds what was said by a prisoner as a witness from what he admitted on examination as an accused. A witness, under s. 132 of the Evidence Act, cannot excuse himself from answering any relevant question upon the ground that the answer to such question will criminate or may tend directly or indirectly to criminate him; but the law also provides that no such answer which a witness shall be compelled to give shall be proved against him in any criminal proceeding except a prosecution for giving false evidence by such answer. It is unnecessary to refer to the particular statements made by seven of the prisoners,—three (1) on one side, and four (2) on the other,—when under examination as witnesses; but several criminating statements have been made by them, especially in cross-examination. The Sessions Judge has made no attempt to exclude these statements, and we think that, in considering the evidence of both these cases together, the jury could not separate the evidence in each, and, even in spite of the strongest precautions both on their own part and on that of the Judge, must unconsciously have been influenced in one case by evidence given in the other. There was no such interval between the two trials as would enable them to efface from their minds the effect of the evidence in one case when considering their verdict in the other. So far, therefore, as the prisoners who were also examined as witnesses in the two cases are concerned, we are quite clear that this irregularity has prejudiced them most materially in their defence. It is almost impossible to distinguish between the case of these accused and that of their fellows, though from the position that the former occupied as witnesses we have less

(1) Nehal Sheikh, Bungshi Dass, and Rhedoy Chowkidar.

(2) Natak Sheikh, Moslem Sheikh, Hakeemcollah, and Itahar Sheikh.

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hesitation in finding that they have been very seriously prejudiced by the mode of trial adopted by the Sessions Judge.

Our attention has been directed to some cases, and particularly to a judgment of a Full Bench—*Queen v. Sheikh Bazu* (1)—in which it was held, that the simultaneous trial of two parties engaged in a riot did not prejudice them so as to necessitate a reversal of their conviction and a re-trial; but we observe that in all these cases the trials were held with the aid of assessors, and not by jury, as in the present case. This difference in the trial is most material as regards the particular effect on the prisoners. The Sessions Judge, with whom the decision in the one form of trial rests, is less likely than a jury to have been influenced by what he learnt in the other case, and while the verdict of the jury would be final on the facts, the findings of the Sessions Judge would be open to correction by the High Court on appeal.

On these grounds we consider that the prisoners in these cases should be retried before a separate jury in each case; and we, accordingly, set aside the convictions and sentences, and direct that the Sessions Judge do so proceed.

We regret to have to notice the manner in which the examination of the accused has been conducted. In permitting a Sessions Judge to examine an accused person from time to time during a trial, the law does not contemplate that he should commence a trial with a strict examination of a prisoner after the manner of the cross-examination of an adverse witness by counsel.

This Court has already pointed out to the Sessions Judge on more than one occasion—see particularly the case of *Chinibash Ghose* (2)—that, by exercising the power allowed by s. 250, the Sessions Court is not to establish a Court of Inquisition, and to force a prisoner to convict himself by making some criminating admissions, after a series of searching questions, the exact effect of which he may not readily comprehend. The real object is to enable a Judge to ascertain from time to time from a prisoner, particularly if he is undefended, what explana-

(1) B. L. R., Sup. Vol., 750; S. C., 8 W. R., Cr. Rul., 47.

(2) 1 C. L. R., 436.

ation he may desire to offer regarding any fact stated by a witness, or after the close of the case, how he can meet what the Judge may consider to be damnatory evidence against him. In one of these cases now before us, we observe that the Judge was engaged, during the whole of the first day, in examining the accused. In like manner, in the second case, he examined the accused at considerable length before the case for the prosecution was opened. Such proceedings appear to us to be an abuse of the power given under the law.

We cannot consider that trials so commenced have been fairly conducted. The minds of both the Judge and jury are at the outset prejudiced by irresponsible statements made by the accused, while subject to this system of cross-examination, before their guilt has been established by the examination of a single witness. We trust that the Sessions Judge will discontinue this practice which has been repeatedly condemned by this Court, and is, in our opinion, quite opposed to the spirit of our law in India.

Convictions set aside, and retrial ordered.

APPELLATE CIVIL.

Before Mr. Justice White and Mr. Justice Maclean.

IN THE MATTER OF THE PETITION OF RAMESSURI DASSEE.*
RAMESSURI DASSEE (REPRESENTATIVE OF JUDGMENT-DEBTOR) v.
DOORGADASS CHATTERJEE (EXECUTION-CREDITOR).

1880
May 25.

Execution of Decree—Civil Procedure Code (Act X of 1877), ss. 248 and 311.

When a judgment-debtor has died after decree, but before application has been made to execute the decree, the Court, before directing the attachment and sale of any property to proceed, must issue a notice to the party against whom the execution is applied for to show cause why the decree should not be executed against him, and its omission to do so will invalidate the entire subsequent proceedings.

* Appeal from Order, No. 295 of 1879, against the order of Baboo Radha Krishna Sen, Munsif of Raneeunge, in Zilla East Burdwan, dated the 24th September 1879.

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A judgment having been obtained by *A* against *B*, and *B* having died before application was made for execution, *A* applied for execution of his decree upon a tabular statement, in which the judgment-debtor was stated to be *C*, widow of *B*, and *C* was also described as the person against whom execution was sought. Upon this application the property mentioned in the tabular statement was directed to be attached and sold, and it was accordingly sold in execution, and purchased by *A*. No notice under s. 248 of the Civil Procedure Code had been served upon *C* before issue of execution.

Held, that the application was improper; that the order for attachment and sale should not have been made; and that the Court which made it should have set the execution aside as soon as it became aware that no notice had issued previous to its issue. The fact of there being no section in the Code expressly authorizing a Court to set aside its proceedings is immaterial, as every Court has an inherent right to see that its process is not abused or does not irregularly issue, and may set aside all irregular proceedings as a matter of course, provided that the interests of third parties are not affected.

Seemle.—Under s. 248, the fact that application to execute the decree had been made in the life-time of *B* would make no difference, unless an order had been made and the property actually attached under it; as whenever an application is made for execution against a legal representative of the judgment-debtor, the notice required by the section must be issued to him, unless the Court has already ordered execution to issue against him upon a previous application.

Baboo Rashbehary Ghose for the appellant.

Baboo Bama Churn Bonnerjee for the respondent.

THE facts of this case sufficiently appear from the judgment of the Court (WHITE and MACLEAN, JJ.), which was delivered by

WHITE, J.—The respondent in this case obtained a decree against the husband of the appellant on the 8th April 1878, and before application was made for execution the husband died. On the 29th March 1879, the respondent applied for execution of the decree upon a tabular statement. In the judgment-debtor column of this statement, the appellant's name is entered under the description of Ramessuri Dasi, widow of Ram Koomar, and in the column for the name of the person against whom execution is sought, the appellant's name is introduced as being that person. Upon this application the Munsif directed the property mentioned in the tabular statement to be attached and sold. The property was accordingly sold in June 1879, and bought

by the respondent himself. Within a month of the sale the appellant applied to set it aside on the ground of irregularity.

One of the objections raised is, that the sale was not duly proclaimed at or near the spot where the attached property is situate.

We pronounce no opinion upon the validity of this objection, as it appears to us that there is a ground upon which the appellant ought to have succeeded in the Court below, and it is this, that the Court directed the attachment and sale of this property to proceed without having previously served a notice upon the appellant in accordance with s. 248 of the Code. This section directs that the Court shall issue a notice to the representative of a deceased judgment-debtor before directing the decree to be executed.

An excuse for the Court, so far as directing attachment to issue is concerned, may, no doubt, be found in the form of the tabular statement. Such a tabular statement ought not to have been put in unless the widow had actually been herself a party to the suit and had been sued as heir of her husband. It was calculated to mislead the Court. It is said by the appellant that it was put in with the intention of misleading the Court; but, whether that was the intention or not, it did not in fact mislead the Court. But, when the irregularity was brought to the attention of the Court, we think it ought at once to have allowed the objection of the appellant. Instead of that, the only notice which the Court takes of the objection in its judgment is this—“It is pointed out that no notice was served on the person against whom the execution was applied for as required by s. 248 of the Procedure Code, but this omission cannot vitiate the sale.”

We think that the omission to give such notice affects the validity, or at all events the regularity, not only of the sale, but of the entire proceedings of the respondent in applying for execution; and that, quite irrespective of whether the irregularity was one under s. 311, the Court should have set the execution aside as soon as it became aware that no notice had issued.

No question arises in this case as to whether the interest of any third party would be affected by setting aside the execu-

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tion-proceedings, because the judgment-creditor is himself the purchaser, and he is the very party who has led the Court into the irregularity which had been committed.

It has been objected that there is no section in the Code which authorises the lower Court to set aside these proceedings; but we think it is not necessary to invoke a section of the Code for the purpose. Every Court has an inherent right to see that its process is not abused or does not irregularly issue, and may set aside all irregular proceedings as a matter of course, provided that the interests of a third person are not affected.

The order that we shall make, therefore, is one reversing the Munsif's order, and directing that the proceedings taken against the appellant in execution of this decree, including the sale, be set aside *ab initio*.

It may be necessary, unless the appellant admits assets and pays the amount of the decree, to take hereafter proceedings to execute it; but these proceedings must be commenced afresh. A tabular statement must be put in in proper form, and a proper notice must be sent to the appellant, so that she may have an opportunity of paying the money or setting forth any defence she may be advised to make.

The appeal is allowed with costs.

The respondent will not be allowed the costs of any of the execution-proceedings taken against the appellant which we set aside by this our order.

Appeal allowed.

ORIGINAL CIVIL.

Before Mr. Justice Wilson.

RAJENDER DUTT v. SHAM CHUND MITTER AND OTHERS.

1880
May 21.

Hindu Law—Partition—Trust—Agreement restraining Partition—Right of Purchaser of Share—Trust for Idol.

By an agreement entered into between five brothers, who formed a joint Hindu family, it was provided, that none of the parties, "nor their representatives, nor any person, should be able to divide the real and personal pro-

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party belonging to the family into shares; that, while the male descendants of any of the brothers lived, the sons of the daughters of the deceased persons should not be entitled to the real and personal properties, nor to the proceeds thereof; that none of the brothers, nor any of their male descendants, should be able to adopt a son; that, during the lifetime of the brothers, or of the one of them who should be the last survivor, their earnings should be regarded as joint property, and that, if any brother or son of a brother separated himself from the family, he should only get Rs. 20,000 as his share." The agreement further provided for the maintenance of widows and infant children, and that the sum of two lakhs of rupees should be taken from the joint khatta for the purpose of carrying on certain businesses. The family dwelling-house had belonged to the mother of the brothers. She made a gift by deed of the house and lands and houses appertaining thereto to an idol, and appointed her sons managers, and directed that they should live in the house, and should not have power to partition or alienate any portion of the properties settled. The deed contained provisions as to the disposition of the profits arising from the lands and houses, *viz.*, to provide accommodation for the families of the managers, and to invest the surplus in the purchase of lands in the name of the idol.

A son of one of the brothers sold his share in the family property. In a suit by the purchaser for partition and an account of the property,—

Held, that the general scheme of the arrangement between the brothers was such as could only be binding upon the actual parties to it, not upon a purchaser from one of the parties, and *à fortiori* not upon a purchaser from the heir of one of the parties.

Anand Chandra Ghose v. Prankusto Dutt (1) followed.

The object of the arrangement was to settle the family property upon trust for the maintenance of the members of the family born and to be born. This could not be done by a gift, and what cannot be done by a gift cannot be done by the intervention of a trust.

The owner of property cannot by mere contract during his life prevent his heirs from partitioning property after his death, and such a prohibition is not binding upon an assignee of the heir.

Anath Nath Dey v. Mackintosh (2) distinguished.

Held also, that there was a good gift of the family dwelling-house to the idol, and that the plaintiff was not entitled to any share therein.

THIS was a suit for partition and an account of joint family property. In the year 1858, the five sons of one Ram Chunder Mitter, deceased, formed a joint family. Their names were Doyal Chund, Gobind Chund, Sham Chund, Anoop Chund, and Atool Chund. On the 24th September 1858, the five brothers

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entered into a written agreement, the effect of which was the main question in the suit.

The first clause recited that they had inherited no moveable property except a few utensils of trifling value; that they were possessed of ancestral immoveable property; and that out of the profits of a banianship business carried on by two of the brothers, Doyal Chund and Sham Chund, real property and company's notes had been purchased: and by this clause those two brothers gave over all such property to the joint family.

The second clause was as follows:—"The proceeds and interest of our aforesaid real and personal properties will be continually expended, as they are now expended, for the food and raiment of our families and for the religious ceremonies, for the presents to friends and relations and the *Deb-Seba* (1), and so forth. Besides that the proceeds of such real and personal properties as are hence to be acquired by us respectively or by one of us, will be expended by us or by our survivor or survivors or our representatives on account of the same purposes; after paying the aforesaid expenditures, should there be any surplus, then it will be invested either in land or Company's paper or in mortgage of sufficient security. But neither we, nor our representatives, nor any person, will be able to divide the real and personal properties into shares."

The third clause provided for the education and marriage of sons and sons' sons and daughters and sons' daughters, and so on in succession. The fourth clause provided for the sale of part of the property in cases of necessity, and directed that the interest of all Company's paper should be invested.

The fifth clause purported to direct the mode of descent of the property in the following manner:—"While the male descendant of any one of us five uterine brothers lives, the sons of the daughters of the deceased persons will not be entitled to the real and personal properties nor to the proceeds thereof, and neither any of us, nor any of our male descendants, will take, or be able to take, a *poosso pootro* or *palock pootro* (2). If any of us or them do so, then such a son will not be entitled to our property.

(1) *Deb* means 'deity'; *Seba*, 'services.'

(2) *Poosso pootro* means 'adopted son'; *palock pootro*, 'foster son.'

And if any of us or any of our male descendants heartlessly influenced by some cause refrain to perform the ancestral family ceremonies, then that person will not be able to enjoy the fruits of this property."

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The sixth clause was as follows:—"During the lifetime of us five uterine brothers, or of the one of us who be the last survivor, whatever is saved from the earnings of us respectively or of one of us will be regarded as our joint property. In the meantime, if one of us, while joint in food, earnestly desires to be separate, then he, being deprived of all the real and personal property secured by us up to that time, will get from our joint estate only Rs. 20,000 (twenty thousand rupees), in two payments of equal amount in two years, and be deprived of the other property. And should one of us die leaving one son or more than that, and should such son or sons on attaining full age desire to be separate, then the son or sons of that person, that is one of us, will get such a share as comprises in proportion of Rs. 20,000 (twenty thousand rupees), and be deprived of the other property; and he who from among us will die leaving his wife survivor, his said wife, during her lifetime, will get for her own expenses Rs. 10 (ten rupees) a month, and remaining as a member of the family she will get her food and raiment, excepting which she will have no right to our other property. Should she decline to be supported in the family circle, then she will get further Rs. 5 (five rupees) a month for her maintenance: and should the son or sons or son's son or sons' sons of us respectively die leaving a wife or wives in like position, then on account of their wives' monthly expense and maintenance the same rule is established; and, should any of us or any of our representatives die leaving an infant child, and should the mother or any of the relatives of the child, instead of allowing such a child or children to remain in our family circle, keep such child or children elsewhere and apply for maintenance, then in the case of a female child she will get Rs. 5 (five rupees) a month up to the time of her marriage; but in case of a male child Rs. 15 (fifteen rupees) will be monthly paid to each up to the time he attains full age; besides which, should he prefer a claim, it will be disallowed."

The seventh clause dealt with separate debts to be incurred by

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members of the family, and declared that the joint property should not be chargeable. The eighth clause made provision for a widowed sister and for other sisters in case of need. The ninth clause gave the power of administration to the eldest male for the time being with the advice of the younger members. The tenth clause prohibited loans without security.

The eleventh clause was as follows:—"Whereas our present property has been acquired by the aid of the banianship and the American agency business, we think that it should be incumbent on us in every respect to keep up this business; consequently we five uterine brothers determined so, that, for the purpose of carrying on all these businesses, the Company's paper to the extent of Rs. 2,00,000 (two lacs of rupees), or ready-money as required, should be taken from this joint khatta belonging to us; and on the death of one of us the survivors will be able to receive aid in like manner: should a loss incur beyond the said two lacs of rupees, our joint estate will not be liable."

The twelfth clause provided for the custody of the document itself.

The family dwelling-house stood on a different footing from the rest of the property. It was the property of one Neemdhone Dasse, since deceased, who was the widow of Ram Chunder and the mother of the five brothers who made the abovementioned contract. On the 7th December 1860, she executed a deed of gift purporting to give the house to an idol. By this deed Neemdhone Dasse appointed her sons managers of the trust, and provided that they should live in the house; that they should not be able to partition or sell any of the endowed properties; that the surplus profits, after providing for the Government revenue and expenses of establishment and worship and the salary of the manager for the time being, should be expended in the purchase of adjacent lands in the name of the idol for the accommodation of the families of the managers and in the erection of new buildings thereon. If there should still be any surplus left, it was to be expended in the purchase of tenanted lands or zemindaries in the name of the idol. The deed then provided that no daughter of a son, nor grandson by a daughter, nor adopted son, should be entitled to carry on the *seba*, nor should an adopted son be

entitled to live in the house. Provision was also made for future managers, and that none of the settlors' descendants who should forsake his religion or give a widow in marriage, or marry a widow, should be entitled to be a manager.

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Of the five brothers, Sham Chund and Anoop Chund were living at the time of the institution of the suit. Doyal Chund died leaving a widow and one son; Gobind Chund died leaving a widow and two sons; and Otool Chund died leaving two sons. He also left a will appointing an executor. One of the sons of Gobind Chund, Prokash Chund by name, by deed dated the 3rd August 1878, sold his one-tenth share in the family property to the plaintiff, who now sued for partition, making all the other parties interested defendants.

Mr. Bonnerjee and Mr. Trevelyan for the plaintiff.

Mr. Kennedy and Mr. Phillips for the defendants.

Mr. Bonnerjee.—A Hindu testator has no control over the income of property which accrues after his death—*Bissonauth Chunder v. Bamasoondery Dossee* (1). There is no difference between a gift by will and 'a gift *inter vivos*'—*Jatindra Mohan Tagore v. Ganendra Mohan Tagore* (2). The effect of the agreement in this case is to deal with joint family property in a way that Hindu law will not recognise. By the fifth clause the settlors purport to direct the mode of the descent of the property, and to exclude persons entitled to the property of their ancestors. The intention of the settlors was to create an estate something like an estate-in-tail male. They attempt to restrict the right of heirs to adopt sons. They may legislate for themselves, but they cannot contract sons or grandsons out of rights to which they are entitled under Hindu law. The intention of the settlors was to create such an estate as was declared to be void in the *Tagore case* (2). A disposition of property, whether by will or deed, which tends to alter in perpetuity the rules of succession is void—*Luckun Chunder Seal v. Koroanamoney Dassee* (3). In *Ramdhone Ghose v. Annund Chunder Ghose* (4), an agreement

(1) 12 Moore's L. A., 41.

(2) 9 B. L. R., 377.

(3) 1 Boulnois, 210.

(4) 2 Hyde, 23.

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 MITTER.** between members of a Hindu family not to partition property without the unanimous consent of all the contracting parties was held to be binding upon the parties to the deed only; and in *Anand Chandra Ghose v. Prankisto Dutt* (1), where there was a similar agreement, it was decided that a purchaser of the share of one of the contracting parties was not bound. Equally the settlors could not have the power of making a contract as against their heirs. The provision as to vesting the property in case of partition cannot be valid as against a person in the position of the present plaintiff. In *Mokoondoo Lall Shaw v. Gonesh Chunder Shaw* (2), a Hindu testator gave all his immoveable property to his sons, but postponed their enjoyment of it for twenty years, and it was held that the restriction was void as being a condition repugnant to the gift, and that the sons were entitled to partition at once. The only difference between that case and this is, that there a part of the property was dealt with; here it is the whole. This deed attempts to create a perpetuity. Gobind Chund Mitter was not entitled to make any such contract as against his heirs. And even if he could bind his heirs, he could not bind assigns from them. As to the mother's gift, so far as the dwelling-house is concerned, we are entitled to have the interest of Prokash Chunder Mitter made over to us. The intention of the lady was to keep up and carry out the agreement of 1858 between her and the sons. It was intended to give the manager the power of preventing people from living in the house, but not to turn out any one residing there. The attempt to restrict the disposition of the surplus is void and can have no operation—*Ashutosh Dutt v. Doorga Churn Chatterjee* (3). There can be a partition subject to a trust in favor of the idol—*Ram Coomar Paul v. Jogender Nath Paul* (4).

Mr. *Kennedy* for the defendants.—The law as to perpetuities has been settled by the decisions of the Privy Council in *Soorjeemoney Dossee v. Denobundoo Mullick* (5) and *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* (6). In *Soorjeemoney Dossee's*

(1) 3 B. L. R., O. C., 14.

(2) I. L. R., 1 Calc., 104.

(3) L. R., 6 I. A., 182.

(4) I. L. R., 4 Calc., 56.

(5) 9 Moore's I. A., 128.

(6) 9 B. L. R., 377.

case (1), Lord Justice Knight Bruce laid down that there is nothing against public convenience, nor anything generally mischievous, or against the general principles of Hindu law, in allowing a testator to give property, whether by way of remainder or by way of executory bequest, upon an event which is to happen, if at all, immediately upon the close of a life in being. That case was relied upon in *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* (2), to show that the English law of executory devises ought to be applied in dealing with Hindu succession. But their Lordships of the Privy Council say (p. 399), after quoting the remarks of Knight Bruce, L. J.: "A consideration of the subject-matter to which these remarks were applied will, however, at once show that they were not intended to have the extensive effect attributed to them. The question was not as to the effect of a gift to a person not in existence, but whether a person in existence, and capable of taking under the will when it had effect, might become entitled upon a future contingency to receive an additional benefit. The testator devised an estate to several sons, with a proviso that, if either of such sons died without having a son or son's son living at his death, neither his widow nor daughter should get his share, but that the same should go over to the other sons. Their Lordships held the gift to be valid. The point in question, therefore, was not raised, and could not have been decided as supposed. Moreover, in the subsequent case of *Mussumut Bhoobun Moyee Debia v. Ramkishore Acharj Chowdry* (3), in which the testamentary power of Hindus in Bengal was fully recognised, it was distinctly laid down that the nature and extent of such power, so far as relates to contingent remainders and executory devises, is not to be regulated or governed by way of analogy to the law of England, which law applies to the wants of a state of society widely differing from that which prevails among Hindus in India." And their Lordships say that they do not desire to express any opinion as to certain exceptional cases by way of contract or of conditional gift on marriage or other family provision for which authority may be found in Hindu law or usage. The con-

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(1) 9 Moore's I. A., 123. (2) 9 B. L. R., 377. (3) 10 Moore's I. A., 279.

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tract in this case is limited within terms which are perfectly reasonable. Suppose the case of a partnership for twenty-one years, with power to the executor of a deceased partner to come in, and with a proviso that if a partner retires he shall not have an account but a particular sum of money; such an agreement would be perfectly good—*Essex v. Essex* (1). In the case of *Ramdhone Ghose v. Annund Chunder Ghose* (2), where there was an agreement not to partition, the Court held, that that was such a contract as could be specifically enforced, and that no party to the agreement could be allowed to partition. In *Anath Nath Day v. Mackintosh* (3), two brothers executed a deed of trust of the joint family dwelling-house, providing that certain religious ceremonies should be performed there for twenty years, and that during that period neither they nor their heirs should have the power to partition. It was held that the mortgagee of the share of one of the brothers having notice of the deed could not obtain partition until the twenty years had expired. If that agreement was good, then the agreement in this case must be good also. (The cases of *Krishnamani Dasi v. Ananda Krishna Bose* (4) and *Saunders v. Vautier* (5) were also referred to.)

Mr. Bonnerjee in reply.

Cur. ad. vult.

WILSON, J.—This case came on for settlement of issues on the 19th and 22nd April, when the several questions of law arising in the case were argued. It was admitted that there was no real contest as to the facts of the case,—that is to say, of the correctness of the pedigree as alleged, and the execution of the several documents set out in or annexed to the pleadings. But as there are infants parties to the suit, it was necessary that these matters, so far as they affected them, should be proved. I directed, under s. 196 of the Procedure Code, that these facts might be proved by affidavit.

Affidavits have since been filed, and the whole case is now

(1) 20 Beav., 442.

(2) 2 Hyde, 93.

(3) 8 B. L. R., 60.

(4) 4 B. L. R., O. C., 231.

(5) 1 Cr. and Ph., 240.

ready for decision. (His Lordship then stated the facts of the case, and proceeded as follows):—

There is no averment or admission in the pleadings that the plaintiff purchased with notice of the agreement of 1858. I called attention to this during the argument, and Mr. Bonnerjee, the plaintiff's counsel, admitted that his client took with notice.

The first question is, whether the plaintiff is disentitled to partition by reason of cl. 6 of the agreement of 1858.

The general scheme of the arrangement is, in my judgment, clearly such as cannot be binding except upon the actual parties to it. Its object is to settle the family property upon trust for the maintenance of the members of the family born and to be born. This could not be done by gift—*Tagore v. Tagore* (1); and what cannot be done by gift cannot be done by the intervention of a trust, — *Krishnaramani Dassee v. Ananda Krishna Bose* (2). On this ground I think cl. 2 and the clauses subsidiary to it, viz, cls. 3, 4, 7, 9, and 10, could bind nobody but the contracting parties.

At first sight those clauses seem also to create an absolute perpetuity. But seeing that the subject of partition is expressly dealt with in cl. 6, it may perhaps be that the other clauses were intended to operate only so long as the property remained unpartitioned, and subject to the ordinary right of partition, except so far as cl. 6 could control that right. However this may be, I think the trusts are bad on the other ground I have stated.

Clause 5, which attempts to establish a new line of descent somewhat analogous to descent-in-tail male, is clearly inoperative.

But it was argued that cl. 6 is valid and binding upon the present plaintiff. The substance of that clause is, that, during the lifetime of the five brothers and the survivors and survivor of them, if any brother or the son or sons of any brother desired to separate, he should be deprived of all share in the property, and should receive Rs. 20,000, or a rateable share of that sum instead. This seems to me to be a prohibition of partition under penalty of having to accept a fixed sum of money in lieu of a share of the estate.*

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The short question that has to be decided is, whether the owner of property can by mere contract during his life prevent his heirs from partitioning property after his death; and further, whether such a prohibition is binding upon an assignee of the heir.

An attempt was indeed made to put the matter in a somewhat different light. It was said that a man may by gift *inter vivos*, or by will, give property to one person with a gift over to another, provided the latter gift is to take effect on or before the termination of a life in being at the time of gift—*Soorjee-money Dossee v. Denobundoo Mullick* (1); and it was argued that cl. 6 should be read as giving the property over to the other sharers in case any one sought partition during the life of any of the contracting parties. But the gift would then be void. A gift, whether primary or substitutionary, can only be to some one in existence at the time of the gift—*Tagore v. Tagore* (2), and this gift, if it be one, is a gift not to the brothers, but to them or their respective heirs, born or unborn at the date of the document, as the case might be. Such a gift cannot take effect—*Tagore v. Tagore* (2), *Soudaminy Dassee v. Jogesh Chunder Dutt* (3), *Kherodemoney Dassee v. Doorgamoney Dassee* (4).

The clause must be regarded as a mere restraint on partition. Now it is clear that a man cannot by gift *inter vivos* or by will give property absolutely to another, and yet control his mode of enjoyment in respect of partition or otherwise. It is scarcely necessary to cite authority for this.

I know of no authority for saying that a man can allow property to descend absolutely to his heirs, and yet by any act during his life restrain their mode of enjoyment in respect of partition or otherwise. The case of *Anath Nath Dey v. Muckintosh* (5) was cited as an authority. In that case two joint owners executed a deed of trust by which certain properties were set apart to provide for religious worship; the worship was to be performed in the family dwelling-house, which was not in-

(1) 9 Moore's I. A., 123.

(3) I. L. R., 2 Calc., 262.

(2) 9 B. L. R., 377.

(4) I. L. R., 4 Calc., 455.

(5) 8 B. L. R., 60.

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cluded in the property set apart, and it was agreed that for twenty years the house should not be partitioned. Macpherson, J., held, that a mortgagee of a half share of the house, taking from the representatives of one of the contracting parties with notice of the trust, could not claim partition during the twenty years. That case decided, I think, no more than this,—that there was a valid trust for the performance of certain worship in the dwelling-house, and as incidental to that trust, a restraint upon partition or alienation during the period of the trust, and that a mortgagee with notice was bound by the trust. This case is very different. If there be any trust here, it is the trust sought to be created by cl. 2, and that trust, for the reasons I have stated, is bad. There remains nothing but the restraint on partition.

In *Ramdhone Ghose v. Annund Chunder Ghose* (1) it was held that a contract similar to the present was binding upon the parties to it. I do not know that the question has ever been expressly raised whether such an agreement is binding upon the heirs of the parties. In the absence of authority I do not see how a man can have greater power of control over the enjoyment of property which he allows to descend than over property which he gives by deed or will. The case of *Anandchandra Ghose v. Prankisto Dutt* (2) is, I think, an authority to the effect that such an agreement does not bind a purchaser from one of the contracting parties. It cannot any more bind a purchaser from the heir of a contracting party.

I come to the conclusion, therefore, that cl. 6 of the agreement of 1858 affords no answer to this suit.

A point is also raised in the written statement, founded upon cl. 11 of the agreement of 1858, as to the capital of the banianship and agency business. But I do not think any question arises as to that. The plaintiff does not claim any share in the business or its capital, and I read cl. 11 as only regulating the extent to which the business should be entitled to draw upon the family funds.

The third question raised was as to the family dwelling-house. It was contended by the plaintiff that the gift by

(1) 2 Hyde, 93.

(2) 3 B. L. R., O. C., 14.

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Neemdhone Dasse in 1860 was not an absolute gift to the idol, but that subject to a trust for worship there was a gift for the benefit of the members of her family mentioned in the deed, of whom Prakash was one. And it was sought to bring the case within the authority of such cases as *Ashutosh Dutt v. Doorgachurn Chatterjee* (1). I do not think this is so. The deed in terms gives the house to the idol, and appoints the four surviving sons managers. The house is to be the perpetual habitation of the idol. The four managers and the sons of her deceased son and their sons are to dwell in it in succession, without power to partition or alienate. After paying the Government revenue, the profits are to be applied to certain poojahs and other religious objects, and the manager for the time being is to receive Rs. 5 a month. The balance, if any, is to be employed in building new buildings for the accommodation of the families of the managers. If there be still any surplus, it is to be employed in the purchase of lands in the name of the idol, to be added to his estate. The deed then makes provision for future managers who are to be the members of the family in the male line in succession, excluding any who shall forsake his religion, or give a widow of his family in marriage or marry a widow

This is in my opinion a good gift of the house to the idol absolutely. The only benefit given to any one else is the salary of Rs. 5 to the manager, and the right given to actual and potential managers to live in the house. These provisions do not, I think, make the property anything but debutter.

The decree will declare that the plaintiff is entitled to the one-tenth share of Prakash in the properties claimed, exclusive of the family dwelling-house. The plaintiff is also entitled to a partition.

But on the partition the widow of Gobind Chund will be entitled for life to a share equal to that of the plaintiff and of her son Nolit Chund.

There will be the usual partition decree, and costs will follow the ordinary rule in partition suits.

Suit decreed.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, Mr. Justice Pontifex, Mr. Justice Morris, and Mr. Justice Miller.

UMAID BAHADUR (DEFENDANT) v. UDOI CHAND *alias* MUN-
MUN (PLAINTIFF).*

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*Hindu Law—Inheritance—Mitakshara—Definition of Sapinda—Sister's
Daughter's Son.*

A sister's daughter's son is an heir according to the Mitakshara.

The author of the Mitakshara, in verse 3, Sec. 5, Chap. II, uses the word "sapinda" in the sense of "connection by particles of one body," and not in the sense of "connection by funeral oblations."

In order to determine whether a person is a "sapinda" of the prepositus, within the meaning of the definition given by the author of the Mitakshara in Acharakanda (chapter treating of rituals), it is necessary to see whether they are related as "sapindas" to each other, either through themselves or through their mothers and fathers.

THE plaintiff, one Udoi Chand, stated, that his father was in possession of a certain village under a deed of gift from one Mussamut Nobo Bahu, dated the 5th January 1861; and that, after his father's death, he held possession of the property, but was forcibly dispossessed by the defendant on the 18th March 1877. He, therefore, instituted proceedings under s. 530 of the Criminal Procedure Code, but these were dismissed; and he thereupon brought the present suit for possession.

The defendant, who alleged that he was a son of a daughter of a sister of Mukhtab Bahadur (who had been the husband of Nobo Bahu) contended, that the plaintiff had not been in possession within twelve years from the date of the institution of the suit: and that the deed of gift was not valid in Hindu law, it being an absolute gift of property made by a widow who had, as such, only a limited interest in the property.

* Full Bench on Regular Appeal, No. 32 of 1878, from the decision of Baboo Kedar Nath Mozumdar, Additional Judge of Gya, dated 19th January 1878.

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The Subordinate Judge found that the suit was not barred by limitation; that the defendant was a stranger to the family, and not a reversionary heir to Mukhtab Bahadur, the husband of Nobo Bahu, and did not come within the definition of "bandhu," and therefore was not a competent person to question the alienation; and further found, that the plaintiff had been wrongfully dispossessed, and gave judgment in favor of the plaintiff.

The defendant appealed to the High Court.

Munshee *Mahomed Yusoof* and Baboo *Saligram Singh* for the appellant.

Mr. *C. Gregory* and Baboo *Mohesh Chunder Chowdhry* for the respondent.

The learned Judges (GARTH, C. J., and PRINSEP, J.) before whom the case was heard referred it to a Full Bench. The referring order was as follows:—

"A question of Hindu law has arisen in this case, which, being of general importance, we think should be referred to a Full Bench.

"The plaintiff in this suit, Udoi Chand, claims certain property as heir to his father, Poran Chand, under a conveyance from one Mussamat Nobo Bahu, the widow of Mukhtab Bahadur, to whom the property originally belonged: and for the purposes of the question at issue, it must be taken that the plaintiff has a right to recover the property from the defendant, unless the latter can show that by Hindu law he is the heir of Mukhtab Bahadur.

"The defendant claims to be the heir of Mukhtab Bahadur through Mussamat Jeswant Koer, his maternal grandmother, his mother having been the daughter of Jeswant Koer, and Jeswant Koer having been the sister of Mukhtab Bahadur.

He contends that, standing in this relation to Mukhtab Bahadur, he is his 'bandhu,' or cognate, and as such his heir within the meaning of the rule laid down in the Mitakshara, Chap. II, Sec. 5, vv. 3 & 6, and in Sec. 6. It is contended on his behalf, that the term 'sapinda' in the latter portion

of v. 3, has been mistranslated by Mr. Colebrooke to mean 'connected by funeral oblations,' whereas its proper meaning is 'connected by ties of consanguinity.' If Mr. Colebrooke is right, the defendant could not be a 'bandhu' of Mukhtab Bahadur, although, on the other hand, Mukhtab Bahadur would be the 'bandhu' of the defendant.

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"The defendant relies upon a passage in the untranslated portion of the Mitakshara (Achar Adhayaya), quoted by Mr. Justice Dwarkanath Mitter in his judgment in the case of *Amrita Kumari Debi v. Lakhinarayan Chuckerbutty* (1). See also a passage from Parasara Madhaba, quoted at page 34 of the same judgment; the cases of *Gridhari Lall v. The Government of Bengal* (2); and Mayne's Hindu Law, s. 436, &c., where the question is thoroughly discussed.

"We, therefore, refer the question, whether the defendant is the heir of Mukhtab Bahadur, for the opinion of the Full Bench."

Munshee Mahomed Yusoff for the appellant.—The question before the Full Bench is, whether a sister's daughter's son is an heir according to the law as laid down by the Mitakshara. The decision of the question depends on the construction of the Mitakshara, Chap. II, Sec 5, v. 6. Does the defendant come within the principle on which that section is based? I shall show that Mr. Colebrooke's translation is not quite correct. There is no definition of the word "bandhu," and in order to define that word we must look at Sec. 5, cl. 3. I admit that some limit must be placed on the word "bhinnagotra," but, according to the true reading, persons who are six gotras removed from the deceased are entitled to succeed. The word "sapinda" merely means "consanguinity." Sec. 7 of Chap. II of the Mitakshara deals with the succession of strangers; therefore, this would show that, in a section in which provision is made for succession of pupils, fellow students, &c., a presumption arises that, before strangers can take, the relations contemplated by the Mitakshara must be exhausted. Clause 4, Sec. 3 of Chap. II further points out, that the meaning of the

(1) 2 B. L. R., F. B., at pp. 33, 34.

(2) 12 Moore's L.A., 448; S. C., 1 B. L. R., P. C., 44.

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word "sapinda" refers to "consanguinity." It shows that "sapinda" is something narrower than relationship. According to the Mitakshara there is a class of heirs who do not offer spiritual benefits to the deceased. Sapindas may be either male or female — *Lallabhai Bapubhai v. Mankuvarbai* (1). Clause 5 of Sec. 4 deals with the succession of brothers of the whole blood, and prefers them to brothers of the half-blood. There is, however, no religious reason given for this. What is, therefore, the principle which regulates the succession of "bandhu?" I say that "bandhus" come under the words "other relatives" mentioned in Chap. III, Sec. 4. Sec. 6, cl. 1, shows, that maternal uncles are "bandhus;" if so, then a sister's daughter's son is also a "bandhu." No doubt, the Dayabhaga bases inheritance on the theory of spiritual benefit—Chap. II, sec. 6, v. 18: but Menu says, that this is not the only principle, pp. 154, 191, 195, 196. The difference between the two is, that the Dayabhaga goes on the principle of religious grounds, whereas the Mitakshara goes on the principle of propinquity or consanguinity. The Viramitrodaya, Pref., p. 12, gives the different doctrines of the laws of inheritance as laid down by the Dayabhaga and the Mitakshara. Mr. Colebrooke's opinion is given in 2 Strange's Hindu Law, p. 242. A "sapinda" under the Mitakshara is not necessarily connected with spiritual oblations. The case of *Amrita Kumari Debi v. Lakhinarayan Chuckerbutty* (2) was the case of a sister's son. It was there held, that a sister's son was a "sapinda" under the Hindu law as administered in the Benares school; and further, that he was a "bandhu," and, as such, entitled to inherit. A sister's son is not provided for in the Mitakshara. The case further shows, that spiritual benefits are not the sole guide to inheritance. The case of *Guru Gobind Shaha Mandal v. Anand Lal Ghose* (3) was a case under the Bengal law; but still, on p. 35, it is pointed out what the word "sapinda" meant as used by Menu. In the Acharakaunda of the Mitakshara, Vijnyaneswara states his views as to what constitutes sapinda-relationship, and the case of *Lallabhai Bapubhai v. Mankuvarbai* (1) points out that the author abandoned the doctrine, that the right to offer

(1) I. L. R., 2 Bomb., 388.

(2) 2 B. L. R., F. B., 28.

(3) 5 B. L. R., 15.

funeral oblations alone constituted sapinda-relationship, and adopted the theory that sapindaship is based upon community of corporal particles, or in other words upon consanguinity. In the case of *Gridhari Lall Roy v. The Bengal Government* (1), it was contended that the maternal appellant, who was held to be a "bandhu" of the father, was not competent to offer funeral oblations; and that, therefore, he was not entitled to inherit; but Sir James Colville (see p. 462) held, that, if he was incompetent to offer funeral oblations, it followed that his right to inherit was wholly independent of the doctrine of spiritual benefits, and was to be determined solely by kinship. In West and Bühler, p. 55 (2d edn.), a list of "bandhus" is given. The case of *Mussamut Umroot v. Kulyandas* (2) shows, that persons within seventh generation, though in the female line, can be heirs. According to the Hindu law of succession in force in Madras, a sister's son is an heir, and it seems he is also a "bandhu:" *Chelihani Tiripati Rayaningaru v. Rajah Suraneni Vencata Gopala Narasimha Rau Bahadur* (3); see also *Kutti Ammal v. Badakristna Aiyar* (4) and *Mussamut Doorga Bibee v. Janaki Pershad* (5), which was the case of a brother's daughter's son.

Baboo Mohesh Chunder Chowdhry for the respondent.—The word "sapinda" must have some limit. It cannot include every kind of relation. The meaning of the word as used by the plaintiff seems to me inconsistent with all the decisions on the subject. [MITTER, J.—The Mitakshara says, that the word "sapinda" includes both males and females, but he further adds, that male sapindas alone inherit.] No doubt, consanguinity is recognized as a ground of inheritance, but there are two principles,—one, that of consanguinity; the other, the conferring of spiritual benefits to the deceased. As to the doctrine of spiritual benefit being the key to the Hindu law of inheritance, see *Amrita Kumari Debi v. Lakhinarayan Chuckerbutty* (6). Chap. II, Sec. 2, para. 6 of the Mitakshara gives a right of inheritance to one of a different family, but it does so on religi-

(1) 12 Moore's I. A., 448; S. C., (3) 6 Mad. H. C. Rep., 278.

1 B. L. R., P. C., 44.

(4) 8 Mad. H. C. Rep., 88.

(2) 1 Borr., 234.

(5) 10 B. L. R., 341; S. C., 18 W. R., 221.

(6) 2 B. L. R., F. B., 28.

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ous grounds. [JACKSON, J.—It seems clear that Menu refers to consanguinity in Chap. IX, ss. 186, 187.] The other side referred to. *Lallabhai Bapubhai v. Mankuvarbai* (1); but that decision is not in conformity with the following decisions:—*Lala Joti Lall v. Mussantut Durani Koer* (2), *Amrita Kumari Debi v. Lakhinaryan Chuckerbutty* (3), *Sheo Sehai Singh v. Omed Kunwar* (4). See also the *Viramitrodaya*, p. 235, and *Smriti Chandrika*, p. 196.

Baboo Kally Mohun Doss on the same side.

Munshes Mahomed Yusoof was not called upon to reply.

The opinion of the Full Bench was as follows:—

We think that the question referred to us should be answered in the affirmative. If the defendant is a “sapinda” of Mukhtab Bahadur within the meaning of v. 3, Sec. 5 of Chap. II of the *Mitakshara*, there cannot be any doubt that he is a bandhu of the deceased.

“The “sapinda” relationship has been defined by the author of the *Mitakshara* in *Acharakanda* (chapter treating of rituals). The following is a translation of the passage as given in West and Bühler, pp. 174 and 175. “(He) should marry a girl who is non-sapinda (with himself). She is called his sapinda who has (particles of) the body (of some ancestor, &c.,) in common (with him). Non-sapinda means not his sapinda. Such a one (he should marry). Sapinda-relationship arises between two people through their being connected by particles of one body. Thus the son stands in sapinda-relationship to his father, because of particles of his father's body having entered (his). In like (manner stands the grandson in sapinda relationship) to his paternal grandfather and the rest, because through his father particles of his (grandfather's) body have entered into (his own). Just so is (the son a sapinda-relation) of his mother, because particles of his mother's body have entered (into his). Likewise the grandson stands in sapinda-relationship to his maternal grandfather and the rest through

(1) I. L. R., 2 Bomb., 388.

(3) 2 B. L. R., F. B., 28, at p. 43.

(2) B. L. R., Sup. Vol., 67, at p. 69; (4) 6 Sel. Rep., 301; S. C., New Ed., S. C., W. B., Sp. No., 173,

at p. 378.

his mother. So also (is the nephew) a sapinda-relation of his maternal aunts and uncles and the rest, because particles of the same body (the paternal grandfather) have entered into (his and theirs); likewise does he stand in (sapinda-relationship) with paternal uncles and aunts and the rest. So also the wife and the husband (are sapinda-relations to each other), because they together beget one body (the son). In like manner brothers' wives also are (sapinda-relations to each other), because they produce one body (the son), with those (severally) who have sprung up from one body (*i. e.*, because they bring forth sons by their union with the offspring of one person, and thus their husbands' father is the common bond which connects them). Therefore, one ought to know that, wherever the word 'sapinda' is used, there exists (between the persons to whom it is applied) a connection with one body, either immediately or by descent."

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" Verse 53. After the fifth ancestor on the mother's and after the seventh on the father's side. On the mother's side in the mother's line, after the fifth, on the father's side in the father's line, after the seventh (ancestor), the sapinda-relationship ceases; the latter two words must be understood; and therefore the word 'sapinda,' which on account of its (etymological) import, (connected by having in common) particles (of one body) would apply to all men, is restricted in its signification, just as the word *pankaja* (which etymologically means 'growing in the mud' and therefore would apply to all plants growing in the mud, designates the lotus only) and the like; and thus the six ascendants, beginning with the father, and the six descendants, beginning with the son, and one's self (counted) as the seventh (in each case), are sapinda-relations. In case of a division of the line also, one ought to count up to the seventh (ancestor), including him with whom the division of the line begins (*e. g.*, two collaterals, *A* and *B*, are sapindas, if the common ancestor is not further removed from either of them than six degrees), and thus must the counting of the (sapinda-relationship) be made in every case."

If in v. 3, Sec. 5, Chap. II, the author of the Mitakshara used the word "sapinda" in the meaning which he has given

1880 to it in the passage cited above, the translation of Mr. Cole-
 UMAID brooke of the verse in question is not correct.
 v. 'Having taken great pains in accurately defining the word
 BAHADUR "sapinda" in the beginning of his work, and having said in
 v. clear words in the passage in question that "one ought to know
 UDOI CHAND. *that wherever the word sapinda is used there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent,*" it is hardly reasonable to suppose that the author used the word in another part of the same work in a different sense. It is a well-understood rule of construction amongst the authors of the Institutes of Hindu law, that the same word must be taken to have been used in one and the same sense throughout a work, unless the contrary is expressly indicated.

It has been said that, in the chapter on inheritance, the word "pinda" has been used by the author of the Mitakshara in the sense of "funeral cake." No passage has been cited to support this contention. On the other hand, it appears abundantly clear from the passage to which we refer below, that the author has used the word "pinda" in the sense of "body," wherever the word sapinda occurs.

In v. 6, Sec. 5 of Chap. II, the author, after laying down that "samanodokas" succeed after "sapinda," proceeds to support this rule by citing an authority thus: Accordingly Vrihat Menu says:—"The relation of the sapinda ceases with the seventh person, and that of samanodokas extends to the fourteenth degree: or, as some affirm, it reaches as far as the memory of birth and name extends. This is signified by gotra or the relation of family name."

In commenting upon slokas 252 and 253 of Yajnavalkya, the author in Acharakaunda (chapter on rituals) cites this text of Vrihat Menu, and says with reference to it, that "sapinda-relationship with the father does not arise by reason of the connection through funeral cakes, but through the connection of particles of one body." In this part of his work, the author treats of the subject of the funeral cakes. If here he assigns to the word "sapinda," occurring in the text of Vrihat Menu before-mentioned, the meaning which he has assigned to it in the

definition given above, it is but reasonable to hold that in v. 6, Sec. 5 of Chap. II, he has used the word "sapinda" in the same sense.

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Again the author, in v. 3, Sec. 3, Chap. III, discussing the question whether or not the mother is preferential heir to the father, says:—"Besides, the father is a common parent to other sons, but the mother is not so; and since her propinquity is consequently greatest, it is fit that she should take the estate in the first instance conformably with the text 'to the nearest sapinda the inheritance next belongs.'" Here it is evident that the word "sapinda," occurring in the quoted text of Menu, has been used not in the sense of "connection by funeral cake," but of "connection of particles of one body." Two of the well-known commentators of the Mitakshara, viz., Ballam Bhutto and Bissessur Bhutto, the author of Subadhini, in commenting upon this passage, give the same meaning to the word "sapinda" in the cited text of Menu.

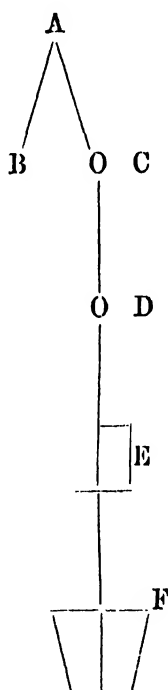
These considerations leave no room for doubt that in v. 3, Sec. 5, Chap. II, the author of the Mitakshara has used the word "sapinda" not in the sense of "connection by funeral oblations," but of "connection by particles of one body" as defined in Acharakanda (chapter on rituals). That this is the case is evident from the fact that some of the enumerated bandhus in v. 1, Sec. 6 of Chap. II, admittedly do not confer any religious benefit on the deceased, and therefore cannot be said to be connected by funeral oblations with him. Our conclusion upon this point is supported by a decision of the High Court of Bombay in the case of *Lallabhai Bapubhai v. Mankuvarbai* (1).

The next question for consideration is, whether the defendant in the case that has been referred to us stands in such a relation to Mukhtab Bahadur, that they are each other's "sapindas" as defined by the author of Mitakshara in Acharakanda.

The defendant in this case is a descendant three degrees removed from Mukhtab Bahadur's father, the common ancestor. Mukhtab Bahadur is the son of the maternal grandfather of the defendant's mother. Therefore they are related as "sapindas"

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to each other. The defendant is a "sapinda" of Mukhtab Bahadur, because he is within six degrees from the common ancestor,—viz., Mukhtab Bahadur's father; and Mukhtab Bahadur, of the defendant, because he is the son of defendant's mother's maternal grandfather. In order to determine whether a person is a "sapinda" of the prepositus within the meaning of the definition, it is necessary to see whether they are related as "sapindas" to each other, either directly through themselves or through their mothers and fathers. Take for example the following table for illustration :—



A is the common ancestor; *B*, his son, is the prepositus. *C*, a daughter of *A*; *D*, her daughter, both dead, *E* is the son of *D* and has a son *F*.

Now *B* and *E* are sapindas to each other, but not *B* and *F*. Although *F* is within six degrees from the common ancestor, yet *B* not being a descendant of the line of the maternal grandfather, either of *F* or of his father and mother, they are not sapindas to each other; but *B* being a sapinda of *E* through

his mother, they are sapindas of each other. The defendant stands in the same relation to Mukhtab Bahadur as *E* does to *B*. Therefore, the question referred to us should be answered in the affirmative.

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PRIVY COUNCIL.

RAMKRISHNA DAS SURROWJI (PLAINTIFF) v. SURFUNNISSA
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P.C.*
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Feb 27 & 28.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Attachment before Judgment—Civil Procedure Code (Act VIII of 1859), s. 240—Objection as to non-compliance with requirements of s. 239—Burden of Proof—Civil Procedure Code (Act X of 1877), ss. 274, 276.

A suit on a mortgage foreclosed under Reg. XVII of 1806, s. 8, comprising property attached before the date of the mortgage under s. 81 and the following sections of Act VIII of 1859, was brought against the purchaser of the attached property, which had been sold under the decree obtained by the attaching creditor. The defence was, that the mortgage falling within the provisions of s. 240 of the Act was void as against the attaching creditor and those claiming under him. For the mortgagee it was contended, that the attachment could not prevail, it not having been proved affirmatively that the requirements of s. 239 relating to the intimation of the attachment had been complied with.

Held, that this objection to the validity of the attachment could not be raised for the first time on this appeal, even if it was not rather for the mortgagee, seeking to deprive the attaching creditor of his possession, to prove the non-observance of the formalities in question.

Semle.—A re-attachment of property after decree does not imply an abandonment of an attachment obtained before decree.

APPEAL from a decree of a Divisional Bench of the High Court, Bengal (24th November 1876), affirming that of the District Judge of the 24-Pargannas (13th September 1875), and dismissing the suit in which the appellant was plaintiff.

In 1872, the respondent, Richard Hendry, representing, with J. P. Hubbard, the firm of Anderson, Wallace, & Co., who had carried on business in Calcutta as builders, brought a suit in the Court of the Subordinate Judge of the 24-Pargannas

* *Present*:—SIR J. W. COLVILLE, SIR B. PEACOCK, and SIR R. P. COLLIER.

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against Surfunnissa Begum, daughter and heir of Munshi Bāzlur Rahim, deceased. The suit was to recover money due from her father's estate for building done by the firm, and the plaintiffs caused an attachment before judgment to be issued, under s. 81 of the then Code of Civil Procedure, upon lands and buildings at Sealdah, which had been part of his estate. Six months afterwards, in May 1873, Surfunnissa Begum, and her husband Mahomed Ehayed, executed to the appellant, Ramkrishna Das Surrowji, a mortgage of the same property. In September 1873 Hendry and Hubbard obtained a decree, under which the same land and buildings were attached (the attachment before judgment remaining still in force), in order to a sale to satisfy Rs. 7,000 due under the decree. A postponement by consent took place, and Hendry and Hubbard, in February 1874, not having obeyed an order to provide costs of fresh proclamations of sale, the proceedings in execution of decree were struck off on the 6th of that month. On the 11th of February 1874, Hendry and Hubbard, who had not been aware of the order to provide fresh costs, made their application for the restoration to the file of the execution-proceedings, which was granted. Fresh proclamations of sale were issued, and in May 1874, the right, title, and interest of Surfunnissa and her husband, as representing the deceased proprietor, in the land and buildings in question, were sold in satisfaction of the decree,—Hendry and Hubbard becoming the purchasers.

Meantime, in the previous January of the same year, on the petition of Ramkrishna Das Surrowji, it had been ordered that the mortgage should be notified at the time of the sale. And in February 1874 notice of the foreclosure of the mortgage under Reg. XVII of 1816, s. 8, had been issued, Surfunnissa Begum and her husband not disputing the foreclosure. In 1875 J. P. Hubbard transferred his interest in the purchase at the execution-sale to Richard Hendry, who afterwards obtained possession. The present suit was brought by the mortgagee to obtain possession of the mortgaged land and houses. Surfunnissa Begum and her husband did not appear, the respondent Richard Hendry alone defending the suit, which was, practically, to eject him.

The District Judge of the 24-Pargannas dismissed the suit, holding that the mortgage was invalid. This decision was confirmed by the High Court, which held, that any mortgage, or other alienation of the property, during the time that it was under the attachment issued before judgment, was inoperative and void as against the person at whose instance the attachment issued; that the attachment never had been removed, and the property remained unaffected by this mortgage (so far as the person at whose suit the attachment issued), at the time it was attached and sold in execution of the decree; and that the attachment after decree never was removed at any time, for the striking off the execution case on default of paying *talabana* left the attachment exactly as it was.

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Mr. *R. V. Doyne* and Mr. *Herbert Cowell* for the appellant.

Mr. *Cowie*, Q. C., and Mr. *J. Graham* for the respondents.

For the appellant it was argued that the original issue of the attachment had been irregular; and principally, that the attachment had not been shown to have been duly intimated according to the requirements of s. 239. Reference was made to *Indrochunder Baboo v. Dunlop* (1).

For the respondents it was argued, that these objections could not now be raised if they were ever tenable. The proof of compliance with the requirements of s. 239 was not upon the purchaser. *Anund Loll Doss v. Jullodhar Shaw* (2) and *Bank of Bengal v. Nundolull Doss* (3) were cited.

At the conclusion of the arguments their Lordships' judgment was delivered by

SIR J. W. COLVILLE.—In this case the appellant sued on a mortgage title, completed, as he alleged, by foreclosure under Reg. XVII of 1806, s. 8, to recover possession of the property in suit from the respondent, who held it as purchaser at an execution-sale in a suit against the mortgagor. The mortgage-deed was in the English form, with a power of sale. Inasmuch as it

(1) 10 W. R., 265; S. C., 1 B. L. R., S. N., 20. (2) 14 Moore's L. A., 543; S. C., 10 B. L. R., 134.

(3) 12 B. L. R., 509.

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was sought to be enforced in the mofussil, the procedure prescribed by the Regulation has been applied to it as if it were a mere *bye-bil-wafa*, or deed of conditional sale. The suit is the ordinary suit, which, in such cases, the mortgagee, who has foreclosed, is obliged to bring in order to recover possession of the mortgaged premises, with this difference only, *viz.*, that it is brought against the purchaser under the execution-sale as well as against the mortgagor, and that the former is the substantial defendant.

In such a suit the plaintiff has to make out his title to dispossess the other party, and any objection which can be taken either to the original mortgage title, or to the proceedings in foreclosure, may be taken.

The respondent was one of a firm of builders who, in December 1872, sued one Surfunnissa Begum, as the daughter of Munshi Bazlur Rahim, and the representative of his estate by virtue of a certificate under Act XXVII of 1860, for the amount claimed as due to them, for work done partly in the lifetime of Bazlur Rahim and partly after his death. On the 10th of December 1872 they applied for and obtained, under ss. 84 and 85 of the Civil Procedure Code, an attachment before judgment, in order to secure the property. Mr. Doyne took objection to the regularity of the issue of that attachment, complaining that there was no proof of the proceedings which are enjoined by s. 81 and the subsequent sections having been adopted. But in their Lordships' opinion, it must be taken that, as between Surfunnissa Begum and the plaintiffs in this former suit, there was a valid and subsisting attachment at the date of the execution of the mortgage, and that this is virtually admitted by the consent order of the 23rd January 1873, which was made when part of the property which had been attached was released from the attachment on the payment of part of the plaintiffs' demand, and it was arranged that the attachment should continue as to the particular property, which is the subject of this litigation.

In these circumstances Surfunnissa Begum, on the 20th of May 1873, executed the mortgage under which the plaintiff claims; and the principal question raised by this appeal is,

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whether that alienation of the property was not, by reason of the attachment, null and void as against the attaching creditors and those deriving title under them. The decree in that suit was made on the 13th of September 1873, and the proceedings in execution began on the 18th of the same month; and it has been suggested on the part of the appellant that, inasmuch as one of these proceedings consisted in an attachment after judgment, it must be presumed that the actual sale in execution proceeded under this subsequent attachment, and that the respondent cannot claim the benefit of the former attachment. Upon this point, the learned Judges of the High Court say:—"The attachment never was removed, and the property remained unaffected by this mortgage (so far as the person at whose suit the attachment issued) at the time it was attached and sold in execution of the decree." Their Lordships must, therefore, assume that, although, where property has been attached before judgment, it is usual to re-attach it after judgment, that proceeding implies no abandonment of the first attachment, which gives the priority of lien. There is no trace here of any express abandonment. If this be so, and there was, as their Lordships think there was, a valid and subsisting attachment at the date of the mortgage, that alienation, unless it can be shown not to fall within the provisions of the 240th section, was null and void as against the attaching creditor and those who claim under him. Hence, the determination of this appeal depends very much upon the point which has been ingeniously raised and argued by the learned counsel for the appellant, and particularly by Mr. Cowell. It is said that s. 240 does not govern the case, for the following reasons:—That section runs thus: "After any attachment shall have been made by actual seizure or by written order as aforesaid, and in the case of an attachment by written order, after it shall have been duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, or otherwise," and so on, "shall be null and void." It is contended that the words "after it shall have been duly intimated and made known in manner aforesaid" incorporate into the 240th, the provisions of the 239th, section, which says, "in the case of

1880 lands, houses, or other immoveable property, the written order shall be read aloud at some place on or adjacent to such lands, houses, or other property, and shall be fixed up in some conspicuous part of the Court-house; and when the property is land or any interest in land, the written order shall also be fixed up in the offices of the Collector of the Zilla in which the land may be situated." Their Lordships entertain some doubt whether, under the circumstances of this case, it was not rather for the plaintiff, who was seeking to oust the defendant from possession, to prove the non-observance of the formalities in question, rather than for the defendant, who was in possession, to prove affirmatively that they had been observed. However that may be, they are clearly of opinion that the point raised is one which cannot be taken here upon appeal for the first time. It is one which ought to have been taken in the Court below, and their Lordships can find no trace of its having been so taken. No such trace is to be found in the judgments, or in the evidence, or in the reasons which are stated in the petition presented to the High Court for leave to appeal to Her Majesty in Council. On the contrary, the first of those reasons seems rather to assume the regularity of the attachment, and to suggest that it had ceased to be a valid and subsisting attachment at the time the mortgage was made. It is in these words: "That their Lordships ought to have held that, even if the said property was legally attached before judgment, such attachment had ceased to be a valid and subsisting attachment under s. 85 of the Act." In the case which has been cited—*Indrochunder Baboo v. Dunlop* (1) — it is clear from the judgment of Mr. Justice Macpherson, who is one of the Judges who decided the present case, that there it had been positively proved that those proceedings which were enjoined by the Act had not taken place. Their Lordships think this is clearly an objection which ought to have been taken in the Court below, and not raised for the first time here, because it involves a question of fact; and if it had been taken before the High Court and argued, the Judges of that Court might have directed a further inquiry into the matter under the powers which its

procedure gives them. Upon this record they think the judgment of the High Court was right, and will, therefore, humbly advise Her Majesty to affirm that judgment and to dismiss this appeal. The costs of this appeal will follow the result.

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Appeal dismissed.

Solicitors for the appellant: Messrs. *Barrow and Rogers*.

Solicitors for the respondent: Messrs. *Wrentmore and Swinhoe*.

APPELLATE CIVIL.

Before Mr. Justice Pontifex and Mr. Justice McDonell.

LALJEE SAIHOY (PLAINTIFF) v. FAKEER CHAND AND OTHERS
 (DEFENDANTS).*

1880
 July 21.

Hindu Law—Mitakshara—Liability of Son to pay Father's Debts.

Under Mitakshara law, according to the rulings of the Judicial Committee, the payment, even in the father's lifetime, of an antecedent debt due by him, is a pious duty on the part of the son, and its discharge is, therefore, such a necessary purpose as to give validity to a sale or mortgage by the father as against his minor sons. Such antecedent debt means a debt antecedent to the transaction,—viz., the sale or mortgage purporting to deal with the property.

In a suit upon a mortgage by the father alone, where the sons are made parties, the decree would be good as against the sons, even though they may have been adult when the debt (assuming it was not for immoral purposes) was incurred, and the whole property would be bound, notwithstanding verse 29, Chap. I, sec. i, and verse 10, Chap. I, sec. vi of the Mitakshara.

In respect of ancestral property the son is equally liable for his father's debts, if not incurred for immoral purposes, as for his own debts. The interest of an adult son, however, could not, ordinarily, be affected by a decree against the father alone.

Where, however, an adult son, although neither an executant of the bond on which the suit was brought, nor a party to such suit, yet was shown to be

* Appeal from Original Decree, No. 179 of 1879, against the decree of Moulvie Mahomed Syed Nurul Hossain, Khan Bahadoor, Subordinate Judge of Shahabad, dated the 31st March 1879.

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himself liable for a large proportion of the antecedent debt due on the bond, and by his conduct had made it apparent that he approved of and fully acquiesced in the sale of the whole ancestral property, and moreover that he allowed the mortgagee to take and remain in possession for upwards of eleven years and to go to expense in paying off encumbrances on the estate,—it was, in a suit by the son to recover his share of such ancestral property, *held*, that he was not entitled to succeed. Under the circumstances the son ought to have been made a party to the suit brought by the mortgagee.

The principles laid down by the Privy Council, and in the Full Bench case of *Luchmun Dass v. Giridhur Chowdhry* (1) by the High Court, discussed.

THIS was a suit for restoration to possession of a specified share of certain ancestral property claimed by the plaintiff in virtue of his right as son and concurrent heir under Mitakshara law.

The plaint, *inter alia*, stated, that one Lala Hurmundul Singh, the grandfather of the plaintiff, and father of the second defendant, died, leaving four sons; that the second defendant, as one of such sons, succeeded to a four-anna share of the ancestral property; and that the plaintiff, as the son of the second defendant, became, on his birth, entitled to a two-anna share of his father's property under Mitakshara law; that, on the 4th July 1866, the first defendant obtained a decree on a mortgage-bond, dated the 2nd January of the same year, against the second defendant, directing a sale of his share of Mouza Kumeryayan; that the first defendant, at such sale, held on the 22nd December 1866, himself purchased, and took possession of the whole four-anna share of the said mouza. In the present suit (the plaint being filed on 15th November 1875), the plaintiff sought to regain possession of a two-anna share of the said mouza.

In his written statement the first defendant asserted, that the mortgage-bond, mentioned in the plaint, had been given by the second defendant as a security for the payment of antecedent debts; that a portion of this consideration was in respect of moneys due on previous decrees obtained in suits in which the plaintiff, as well as his father, the second defendant, had been made parties; that a further portion of the money so secured was borrowed by the second defendant to defray the expenses attendant upon the performance of the *shrad* ceremony of the plaintiff's

(1) I. L. R., 5 Cal., 855.

grandfather; and that no part of the debt incurred under the bond had been so incurred for an immoral purpose. The first defendant also contended that, under the Mitakshara law, the debt not being contracted for an immoral purpose, the whole of the share of the ancestral property which descended to the second defendant and the plaintiff was liable for the debt of the father; and further, that the plaintiff, by his conduct at the time when the bond was executed and the decree of the 4th of July 1866 was obtained, must be taken to have acquiesced in the sale of the whole four-anna share of the Mouza Kumeryawan, which followed upon the decree.

The Court of first instance found on the facts that the debt due on the mortgage-bond, dated the 2nd January 1866, was incurred to pay valid and legal debts due to the first defendant by the second defendant, and, to some extent, by the plaintiff himself; that there was nothing in the bond which exempted the share of the plaintiff from sale under the decree; and that the plaintiff was aware of and acquiesced in the sale of the whole of the four-anna share of Mouza Kameryawan. For these reasons the Court dismissed the plaintiff's suit.

The plaintiff, thereupon, appealed to the High Court.

Baboo Hem Chunder Banerjee and Baboo Doorga Pershad for the appellant.

Baboo Mohesh Chunder Chowdhry, Baboo Chunder Madhub Ghose, and Baboo Abinash Chunder Banerjee for the respondents.

The judgment of the Court (PONTIFEX and McDONELL, JJ.) was delivered by

PONTIFEX, J.—This appears to us to be one of those fraudulent cases on the part of a Mitakshara father and son, which have led to the late fluctuating developments of Mitakshara law. The case stood over in consequence of a similar point, at the time it came on, being before a Full Bench,—*Luchmun Dass v. Giridhur Chowdhry* (1) and the argument was delayed till the decision of the Full Bench had been given. Now, I was a member of the Full Bench on that occasion, and as I understand it, the

(1) I. L. R., 5 Cal., 855.

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decision given by the Full Bench in that case does not interfere with the opinions expressed in the judgment of myself and Mr. Justice McDonell in the case of *Pursid Narain Sing v. Honooman Sahay* (1), (which was one of the cases mentioned in the Reference to the Full Bench), except that it would seem, in consequence of the rulings of the Privy Council, we are bound to hold that the payment, even in the father's lifetime, of an antecedent debt due by him is a pious duty on the part of the son; and its discharge is, therefore, such a necessary purpose as to give validity to a sale or mortgage by the father as against his minor sons (but not against his adult sons), whether such antecedent debt does or does not come within the words—"If a calamity affecting the whole family requires it, or the support of the family renders it necessary, or indispensable duties, such as the obsequies of a father or the like, make it unavoidable;" always provided that the antecedent debt is not incurred for immoral purposes. It was, however, the opinion of the Full Bench, that the antecedent debt spoken of by the Privy Council means a debt antecedent to the transaction, viz., the sale or mortgage purporting to deal with the property.

But if the property is dealt with by a decree in a suit upon a mortgage by the father alone, to which suit the father and sons are parties, it follows, from the Privy Council decisions, that, as against the sons, even though they may have been adult when the debt (assuming it was not for immoral purposes) was incurred, and notwithstanding verse 29, Chap. I, sec. i, and verse 10, Chap. I, sec. vi, of the *Mitakshara*, the property would be bound; not indeed by virtue of the mortgage, but by virtue of the father's debt antecedent to the suit being enforceable against the joint ancestral estate, and therefore against the mortgaged property as part of it. Strictly speaking, perhaps the suit should be in the form of a suit upon the mortgage as against the father, and upon the debt as an antecedent debt as against the interests of the sons in the joint ancestral estate. But this would be merely matter of form; and the neglect to frame the suit accurately would, probably, not prevent the Court making a decree which would give the sons an opportunity of

(1) I. L. R., 5 Cal., 845.

redemption. The result in fact seems to be, that *qua* ancestral property, the son is as equally liable for his father's debts, if not incurred for immoral purposes, as for his own debts. But if the interests of an adult son were affected by a decree against the father alone, which, in our opinion, is not the law, the unreasonable consequence might be, that the son's interest would be more liable for the payment of the father's debt than for the debt, and perhaps the prior debts, of the son, for no creditors of the son could touch his interest without suing him.

No doubt, previously to the Privy Council judgment, it was considered that the pious duty of paying the father's debts did not arise until after his decease. This resulted from what appears to have been considered by the Privy Council a too literal interpretation of the texts which applied to the subject, and which, for convenience' sake, may be referred to as to a great extent collected in Chap. V, sec. iv, of the Mayukha. But by the decisions of the Privy Council it has now been established, that it is a pious duty of the son to pay his father's debts out of the ancestral estate even in the father's lifetime.

Now, in the present case, a Mitakshara father mortgaged certain ancestral mehals for the purpose of securing the sum of Rs. 9,000. That sum of Rs. 9,000 was made up of three sums due to the mortgagee on antecedent decrees,—*viz.*, a sum of Rs. 2,598-3-8, due on a decree of 19th December 1864; a sum of Rs. 822-6-6, due on another decree of the same date; and the sum of Rs. 5,183-9-4, due on a decree of 29th November 1864. These three decrees made up the sum of Rs. 8,604-3-6. The mortgagee agreed to give up Rs. 204-3-6, but at the same time advanced an additional sum of Rs. 600, thereby making up the whole sum of Rs. 9,000. Now, the first two antecedent decrees which I have mentioned were against the father alone; but they were decrees which have not been impeached, and which show that there were antecedent debts due from the father at the time of the execution of the mortgage bond. The third decree, of the 29th November 1864, was a decree on a bond given by the father and his son, the present plaintiff, which decree had been obtained against the father and the present plaintiff. It is not attempted in this case to show

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that that decree was a fraudulent or improper decree; No steps were even taken to set it aside; and we must assume, therefore, that the debt was a valid debt against the father and the son; and that being the case, the whole sum of Rs. 9,000, alleged to be secured to the defendant by the father's bond, was, at the date of such bond, an antecedent debt due by the father, with the exception of Rs. 600 advanced at the time. Now, that is so insignificant a proportion to the whole sum that, probably, it might be left out of account altogether. But as a matter of fact there is a recital in the bond that it was taken for the *haruj* ceremony of the grandfather of the present plaintiff; and we find by a statement in the plaint that the grandfather died just one month before the execution of the bond in question. We think, therefore, that we may safely assume that the Rs. 600 was advanced to the father for a purpose which would be binding on the ancestral estate. Now, upon this mortgage-bond the defendant, mortgagee, sued the father alone. He obtained a decree, the property was put up for sale, and the mortgagee purchased it. It is true that the decree was in the form in which decrees were then drawn, declaring that the right, title, and interest of the defendant should be sold. But there can be no doubt whatever upon the evidence in this case, that it was the belief of the mortgagee, at the time when he executed the decree, that he was selling and purchasing the whole 16 annas of the property hypothecated. Still, if there were no other circumstances in this case, we should have been bound, on the principles to which I have referred at the commencement of this judgment, to hold, that the son's interest would not be affected by that decree, he not having been a party to the suit. But in reality we find that in this case there are very special circumstances. Not only was the bond given, as to the larger proportion of the amount secured, for a debt actually due by the son, but we find, upon the evidence, that the son was present at the time of the execution of the bond; and that he was a consenting party to his father mortgaging this mehal. We also find, upon the evidence, that after the suit had been commenced by the mortgagee, and a decree obtained, the son went to the mortgagee and asked him to postpone the execution of the decree.

Moreover we find, that the son allowed the mortgagee to purchase, and to enter into possession, and to hold possession of the 16 annas for nearly twelve years, because the purchase was made in December 1866, and this suit was not commenced until November 1878; and it is a noticeable circumstance that the plaintiff has carefully abstained from presenting himself as a witness.

But the case does not rest there alone, for there is evidence to show, and we have been assured, that, after his purchase, the mortgagee paid off money-incumbrances upon this estate. In consequence of the son standing by and allowing the mortgage to be made, allowing the mortgagee to believe that the mortgage would affect that whole 16 annas of the property, and afterwards allowing him to take possession under his purchase, to continue such possession for a period of eleven years and upwards, and to discharge incumbrances on the estate, we think it would be manifestly unfair and improper, under the circumstances, to allow the son in this suit to treat the purchase by the mortgagee under his decree as if it did not affect the son's interest at all. If these circumstances did not exist, we should have said, as we have stated before, that the son being adult, and being no party to the mortgage or to the suit upon it, would not be bound by the decree; and even under existing circumstances, we think that, properly, he ought to have been made a party to the suit. But the question now is, ought he to succeed in this suit? He has allowed nearly twelve years to expire before bringing the present suit; and when he brings the suit, he makes no offer whatever to pay off the sum that was secured by the mortgage-bond, or the sums paid by the defendant in discharge of incumbrances on the estate. Now, we have shown that the son is liable, at all events, so far as ancestral estate goes, which would include this mortgaged property, to pay the antecedent debt of the father; and the mortgagee would be entitled to enforce, in execution against this property, any decree he might get against the son for that antecedent debt. We think it would be wholly unfair in this suit to give the plaintiff a decree when he has not offered in any way to pay off that; and stand inasmuch as he stood by when the mortgage,

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purporting to affect the whole 16 annas, was made, and allowed the defendant to take and hold unquestioned possession of the estate for more than eleven years, to deal as owner with the other incumbrances on this property by paying them off, and to be put to a very considerable expense in that way, we think that he ought not now to have even an opportunity of redeeming the property. What we shall do, therefore, will be to affirm the decree of the Court below and dismiss the plaintiff's suit. The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Morris and Mr. Justice Prinsep.

1880
June 10.

KRISTODASS KUNDOD AND ANOTHER (DEFENDANTS) v. RAMKANT ROY CHOWDHRY (PLAINTIFF).*

— *Practice—Joinder of Causes of Action—Civil Procedure Code (Act VIII of 1859), s. 7—Limitation Act (IX of 1871), sched. ii, art. 15—Mortgage Decree—Sale for Arrears of Revenue—Surplus Sale-Proceeds—Marshalling.*

A mortgagee brought a suit against the mortgagor to have a declaration of his lien over the mortgaged properties, and obtained a decree. He afterwards brought another suit against certain attaching creditors of his mortgagor, to have a declaration of his lien over certain surplus moneys in the hands of the Collector, who, previous to the institution of the first suit, had sold certain of the mortgaged properties free of all incumbrances for arrears of Government revenue. *Held*, that the second suit was not barred under Act VIII of 1859, s. 7.

Held also, that the mortgage decree declaring the lien over all the mortgaged properties covered the surplus sale-proceeds then in the hands of the Collector, because these moneys must, as between the mortgagee and attaching creditors of the mortgagor, be taken to represent the mortgaged properties.

Heera Lal Chowdhry v. Janokeenath Mookerjee (1) followed.

The doctrine of marshalling does not apply as between a mortgagee and attaching creditors of the mortgagor who hold mere money-decrees.

The period of limitation prescribed by art. 15, sched. ii, Act IX of 1871, for a suit to set aside an order of a Civil Court, does not apply where the order simply amounts to a declaration that the Court considers it has no jurisdiction to act in the proceeding before it.

* * Appeal from Original Decree, No. 145 of 1878, against the decree of F. J. G. Campbell, Esq., Officiating Additional Judge of Chittagong, dated the 20th February 1878.

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KUNJIBHAN
KUNJIBHANBANKRUPT
NOT ORDER
DEBT.

THE facts of this case were as follows: On November 3rd, 1875, Ram Sunder Sen and Ram Chunder Sen mortgaged certain properties to Gonesh Misser on a bond containing a condition for payment of principal and interest within one year. The bond also contained the following stipulations:—

“We shall pay the Government revenue. If we do not pay the Government revenue, and if, in consequence, all or any of the mehals be sold by auction for realization of the Government revenue, then you shall be competent to take the principal and interest that shall have been due to you from the Collectorate from and out of the surplus sale-proceeds on the strength of this deed of conditional sale. Neither we, nor our heirs, shall be competent to take any objection to it, and no objection, if taken, shall be legally valid. In case the proceeds of the sale of the mehals in mortgage do not cover the amount that shall have been due to you on account of principal and interest, you shall be competent to realise the principal and interest by sale of our other properties, whether moveable or immoveable.”

Shortly afterwards the mortgagors neglected to pay the Government revenue on nine of the mortgaged properties, which were accordingly sold, under Act XI of 1859, free from all incumbrances.

The defendants in the present suit, who held money-decrees against the mortgagors, obtained orders from the Civil Court attaching the surplus sale-proceeds which remained as a deposit in the Collector's office to the credit of the mortgagors, their debtors.

On May 13th, 1876, the mortgagee applied to the Judge for an order releasing the surplus sale-proceeds from these attachments, on the ground that they were liable to satisfy his mortgage, and he asked to have evidence taken of his claim. The Judge held, on the authority of the case of *Brojonath Mitter* (1), that he had no jurisdiction to determine the priority of claims to money in deposit in the Collector's Court, and he declined to take any proceedings on that petition. The mortgagees then applied to the Collector for payment of this money,

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DERY.

but this application was also rejected, and an order was passed on the 16th May 1876, that the money could "not be paid to any person other than the malik," probably meaning the mortgagors.

On January 9th, 1877, Gonesh Misser sued the mortgagors on his mortgage bond to recover the money due thereon, "by declaration of a lien" on the mortgaged properties, or, if that were not sufficient, from the other properties of the mortgagors; and a decree was passed on 5th February following, which declared that "the mortgaged properties stand subject to lien until the realization of the money."

Application for execution of this decree was made on 6th April 1877, by sale of the mortgaged properties, the nine properties which had been sold for arrears of revenue as already stated being excluded from this application, though they, with the other properties, were entered in the schedule attached to the decree.

Gonesh Misser, the original mortgagee, sold this debt, on 21st May 1877, to Ramkant Roy. He, as transferee judgment-creditor, attempted to attach the surplus sale-proceeds of these nine properties. Thereupon opposition was made by the present defendants, who had already obtained orders of attachment, and the Judge, on 11th August 1877, declined to take any action for the reasons recorded by his predecessor on 13th May 1876, which have been already stated. Ramkant Roy, on 29th August 1877, brought the present suit to set aside this order of the 11th of August, and to declare that the surplus sale-proceeds were subject to his mortgage lien.

Against the decree given to the plaintiff by the Additional Judge of Chittagong, two of the decree-holders, defendants, appealed.

Mr. Bell (with him Baboo Chunder Madhub Ghose) for the appellants.—The limitation applicable to this case is Act IX of 1871, sched. ii, art. 15. The suit is, under that article, barred by limitation. It is also barred under s. 7 of Act VIII of 1859: *Moonshee Buzloor Roheem v. Shumsoonissa Begum* (1) and *Ram-*

hurry Mondul v. Mothoormohun Mondul (1). Even if the suit does lie, the Court will compel the mortgagee to go against the other mortgaged estates and leave the surplus proceeds to the general creditors.

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Mr. P. O'Kinealy (with him Baboo *Akhil Chunder Sen*) for the respondent.—Act IX of 1871, sched. ii, art. 15, does not apply here, because the Court refused to pass any order in the case, and because this is not a suit to set aside an order of the Civil Court: *Koylash Chunder Paul Chowdhry v. Preonath Roy Chowdhry* (2). Nor is the suit barred under Act VIII of 1859, s. 7, because the subject-matter and the parties in both suits are different. The decree against the mortgaged properties covers the surplus proceeds in the hands of the Collector, which must be taken to represent the properties themselves for all the purposes of the mortgage: *Heera Lal Chowdhry v. Janokeenath Mookerjee* (3); Macpherson on Mortgages, pp. 113, 234. The appellants are mere general creditors, and therefore the doctrine of marshalling does not apply.

The judgment of the Court (MORRIS and PRINSEP, JJ.), was delivered by

PRINSEP, J. (who, after stating the facts as above, continued):—The first objection is, that the suit is barred by limitation under art. 15 or art. 16, sched. ii, Act IX of 1871, because it has not been instituted within one year from the order of the Judge, dated 13th May 1876, or that of the Collector, dated 16th idem, rejecting the mortgagee's applications. We have, however, no doubt that these articles do not apply, inasmuch as in neither case was there any order passed adverse to the mortgagee's right after any adjudication thereof. The orders passed simply amounted to a declaration, that neither the Judge, nor the Collector, considered that he had jurisdiction to act as desired. The general law of limitation for suits to establish a right would, therefore, apply to the present suit, and under that law the suit is not barred.

(1) 20 W. R., 450.

(2) I. L. R., 4 Calc., 610.

(3) 16 W. R., 222.

1880

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DEHY.

The main objection pressed on us by Mr. H. Bell, who appears as counsel for the appellants, is, that this suit is barred by s. 7, Act VIII of 1859, because in his suit against the mortgagors, the mortgagee, knowing that these nine properties had been sold for arrears of revenue, did not apply to have the surplus sale-proceeds declared subject to his mortgage lien, but merely asked for and obtained a decree against the mortgaged properties. Mr. Bell contends that, as the mortgagee did not ask for all the relief to which he was entitled, he cannot now sue for the balance of his claim; that the surplus sale-proceeds are distinct from the mortgaged properties, which by the decree have been charged with the debt; and that, if he could not bring a second suit against the mortgagors, he cannot bring one against the present defendants, the creditors of the mortgagors who have obtained orders of attachment in execution of decrees held by them. He relies principally on the case of *Moonshee Buzloor Roheem v. Shumsoonissa Begum* (1) and on *Ramhurry Mondul v. Mothurmohun Mondul* (2), but the fallacy of this argument appears to us to lie in the fact that the judgment-debtors, mortgagors, have not made, and indeed could not make, any opposition to the execution of the mortgage decree on the surplus sale-proceeds. The cause of action in the present suit is certainly distinct from that in the first suit. In that suit the mortgagee sought to establish his mortgage-debt and his lien on the mortgaged properties, and to obtain an order of the Court enforcing it, and the cause of action was the default of the mortgagors to make payment within the stipulated time. The cause of action in the present suit is the opposition of certain creditors to the satisfaction of the mortgage-decree out of money which represents the balance due to the mortgagors after payment of Government revenue on nine of the mortgaged properties sold under Act XI of 1859, in consequence of their default. If the mortgagee had, in the suit to enforce the terms of the mortgage bond, attempted to obtain a lien on this money, it would have been necessary either to make the present defendants parties to that suit, or to bring the present suit, before he

(1) 11 Moore's I. A., 551, see 603 & 605.

(2) 20 W. R., 450.

could obtain a decree binding on the present defendants. But in such a case the present defendants might reasonably complain that they were not concerned in the cause of action, the default of the mortgagors; that the claim to the money was one dependent entirely on the manner in which execution of the mortgage-decree was taken out; that, when this matter arose, they would be prepared to defend their rights, and that, therefore, they should be dismissed from the suit. Such an objection would, in our opinion, be irresistible. To use the words of their Lordships of the Privy Council in the case already quoted: "The correct test is, whether the claim in the new suit is in fact founded on a cause of action distinct from that which was the foundation of the former suit" (1). Applying this test we have no doubt that the cause of action in the two cases are distinct.

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DREY.

But besides these grounds we are of opinion that the objection must fail for another reason. In the case of *Heera Lal Chowdhry v. Janokeenath Mookerjee* (2), the High Court (Norman, Offg. C. J., and L. S. Jackson, J.), declared, that "it has been long settled by decisions from the time of the late Sudder Court, in consonance with reason and justice, that when mortgaged lands are sold for arrears of Government revenue, not accrued through default of the mortgagee, any proceeds which may arise from the sale in excess of the arrears belong to the mortgagee, and he has a right of action for their recovery. It is clear in fact that the money, the proceeds of sale, which had been substituted for the land mortgaged, became subject to the lien to which the land which it represented was subject."

The Court, in that case acting on this principle, required a creditor, who had, in execution of a money-decree against the mortgagor, attached such surplus sale-proceeds, to refund that money to the mortgagee. The cases decided in the Sudder Court, to which reference has been made in this judgment, are quoted in Macpherson on Mortgages, 6th edition, p. 234.

Taking the surplus sale-proceeds as representing the nine mortgaged estates which had been sold for arrears of revenue, the decree obtained by the mortgagee declaring his lien on them

(1) 11 Moore's I. A., at p. 605.

(2) 16 W. R., 222.

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DREY.

and other estates would be the same as declaring a lien on that money; and as I have before pointed out, a declaration of a lien on that money expressly would not be binding against the present defendants, who would be entitled to show, if they could do so, that that money was not subject to any such lien, but had been rightly attached in satisfaction of their decrees. This, under the rule laid down in *Brojonath Mitter's case* (1), could not be determined except in a separate suit such as has now been brought.

Mr. H. Bell next contends that, as a Court of Equity, we should compel the mortgagee to execute the decree first on the other mortgaged properties, but we can find no authority for such a course. The defendants are holders of ordinary money-decrees, and have no special claim on our consideration, such as to require us to interfere with and limit the undoubted rights of the mortgagee. He has an easy way of realizing the money due to him, and he is entitled to take advantage of it. The defendants can proceed to execute their decrees against other properties. It is thrown out by Mr. Bell, that these properties may be subject to other incumbrances. If that be so, there is still more reason for our refusing to require the mortgagee, plaintiff, to proceed against these properties, for the defendants, creditors on no security, cannot ask to have the advantage of the prior mortgage held by the plaintiff, so as to enable them to obtain their money to the detriment of these incumbrancers, and more particularly without giving them an opportunity of resisting such an order.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 13 W. R., 301.

Before Mr. Justice Morris and Mr. Justice Prinsep.

KASHEERISHORE ROY CHOWDHRY (PLAINTIFF) *v.* ALIP
MUNDUL AND ANOTHER (DEFENDANTS).*

1880
July 22.

Co-Sharers—Enhancement—Notice of Enhancement.

Held, in a suit for enhancement by one co-sharer, to which the other co-sharer was made a party, that one co-sharer is not competent to issue a proper notice of enhancement without the consent of the other co-sharers previously obtained, though the rent has been paid to each co-sharer separately. Under the ruling of the Full Bench, in the case of *Guni Mahomed v. Moran* (1), he must first establish his right to a separate contract to recover his rent separately on his individual share.

THIS was a suit for arrears of rent at an enhanced rate, instituted on the 10th of July 1875. The plaint stated that the plaintiff and the second defendant, Bisseswari Chowdhra-nee, were the owners of a zemindary, in which the first defendant held a jote, the rent of which he paid to each co-sharer separately. Previously to 1280 (1873), the plaintiff had granted his share to his wife, Hurrosoondari Debi, “under a talukdari settlement, to hold and enjoy the same during her lifetime.” She died in the month of Pous 1281 (December 1874), but in the year 1280, she had directed a notice of enhancement to be served on the first defendant, and it was upon this notice that the present suit was brought. The Court of first instance held, that the notice was invalid, and that one co-sharer could not sue alone for enhancement of rent. On appeal this judgment was reversed, and the cause remanded for trial on the merits. The lower Court, on retrial, gave the plaintiff a decree. The defendant appealed, and on appeal the judgment of the lower Court was reversed, and the suit dismissed with costs on the authority of *Guni Mahomed v. Moran* (1).

The plaintiff then appealed to the High Court.

* Appeal from Appellate Decree, No. 215 of 1879, against the decree of H. Beveridge, Esq., Officiating Judge of Rungpore, dated the 28th October 1878, reversing the decree of Baboo Aubinash Chunder Mitter, First Munsif of Bogoarah, dated the 29th May 1877.

(1) I. L. R., 4 Calc., 96

1880

KASHEE-
KISHORE ROY
CHOWDHRY
v.
ALIP MUN-
DUL.

Mr. A. M. Bose, Baboo Mohiny Mohun Roy, Baboo Rash-
behary Ghose, and Baboo Grish Chunder Chowdhry for the
appellant.

Baboo Grija Sunker Mozoomdar for the respondents.

The following judgments were delivered:—

PRINSEP, J. (after shortly noticing other objections not
material to this report, continued):—

Mr. Bose has endeavoured to show that this suit does not
fall within the terms of the case referred to the Full Bench;
and he argues, that an expression of opinion which goes be-
yond that case is an *obiter dictum*, and is not binding on this
Division Bench.

It appears to me, however, that the judgment of the Full
Bench is directly in point, and we are bound to apply it to the
present case. The case referred to the Full Bench was thus
stated: "Whether the ijaradar of a co-sharer of an entire
estate, who has for some time realized his rent separately in
respect of his share, can sue to enhance the rent of that share
separately without joining the other co-sharers of the tenure?"
The judgment of the Full Bench declared, "that that question
should be answered in the negative." It also declared, that
"the Rent Law does not contemplate the enhancement of a
part of the entire rent, and the enhancement of the rent of a
separate share is inconsistent with the continuance of the lease
of the entire tenure."

The grounds upon which the judgment of the Full Bench
proceeded are thus stated:—

"The entire tenure was originally held by the tenant under
all the co-sharers at an entire rent; but by some arrangement
amongst themselves, consented to by the co-sharers on the one
hand and by the tenant on the other, the latter had been in the
habit of paying a portion of the rent to each co-sharer in res-
pect of his separate share; such arrangements are by no means
unusual, and they may be evidenced either by direct proof or
by usage from which their existence may be presumed. But
in either case they are perfectly consistent with the continu-

ance of the original lease of the entire tenure; and the same consent of all the parties, by which the arrangement was originally created, may at any time put an end to it." Although in accordance with the practice of this Court I have always followed this rule, I have done so, with an expression of my own opinion in dissent from it, because it seems to me that the separate payment of rent to each of several co-sharers constitutes a separate tenancy, so far as regards each of the landlords, which would entitle each, if not otherwise debarred, to claim an enhancement of the rent payable to him separately.

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Mr. Bose has referred to two cases,—one *Troylochotaran Chowdhry v. Muthoora Mohun Dey* (1), decided by Morgan and Shumbhoo Nath Pundit, JJ., and the other decided by Peacock, C. J., and Jackson, J. (2), which were not quoted in the argument before the Full Bench, and are in conflict with its judgment. And I have already on a previous occasion referred to these cases.

A point, however, arises in the case now before us, which apparently was not considered by the Judges who formed the Full Bench, and that is under what authority the notice of enhancement required by s. 14 of the Rent Law should be issued, where one of several co-sharers alone desires to enhance the rent of a tenant. Previous service of a notice of enhancement alone confers the right to sue for rent at an enhanced rate, and therefore, unless a proper notice has been served, no suit of the nature contemplated by the Full Bench could properly be brought. The enhancement must extend to the entire holding of the tenant, or this can be effected only in the presence of all the co-sharers. One sharer would not be competent to issue a notice of enhancement of the rent of the entire tenure, nor could he, under the terms of the judgment of the Full Bench, issue notice of enhancement of the rent due on his own particular share except with the consent of his co-sharers previously obtained.

If that consent be withheld, he cannot, as held by the Full Bench, put an end to the original contract or modify the terms

(1) W. R. (1864), Act X Rul., 41.

(2) *Id.*, note.

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of the arrangement under which separate payments of particular shares of rent were made.

Mr. Bose could not contend that, in the present suit, in which plaintiff demands an enhanced rate on the particular share of rent due to him alone, the other co-sharer, who is joined as a defendant, would be entitled also to claim the same rate on her share, for the notice of enhancement served by the plaintiff on the defendant-tenant claims only the rate due on his own share, calculated on what would be due on the entire tenure. Plaintiff, as the proprietor of only a share, could alone not demand more. If he could not do that, he could not bring the present suit on the ground assigned by the Full Bench to substitute a separate contract for rent at an enhanced rate on his share of the property, for the original contract still subsisting, under which rent was paid in one lump sum on the entire tenure. He must first establish his right to a separate contract to recover rent separately on his individual share, he will then be in a position to serve a notice of enhancement of that rent, and after that to sue to enforce his rights at the rates claimed. Until this is done, so long as any of his co-sharers refuse to join with him, the plaintiff cannot assert his rights separately.

MORRIS, J.—I too am of opinion that, on the authority of the decision of the Full Bench in the case referred to, this appeal must be dismissed. Their Lordships, as I understand their judgment, considered that, without the rescission of the original contract in respect to the entire rent, for which purpose all the parties to it must be before the Court, a single sharer in a joint undivided tenure cannot sue, to raise the rent of his share, even though hitherto, by an arrangement which has been concurred in by all the contracting parties, he has been paid separately his quota of the stipulated rent.

Here the judgment, as an expression of opinion of the Full Bench on the point referred to it, may be said to end. But it by no means follows, as has been argued by Mr. Bose, that when, in a suit of this kind, a sharer has made his co-sharer a party, and so brought all the parties to the original contract before the Court, a fresh apportionment of the rent can at once be

made, and a new contract entered into in the terms desired by the sharer-plaintiff. As justly observed by their Lordships "if the original lease of the entire tenure is cancelled, or put an end to by the consent of all the parties, the co-sharers and the tenant are at liberty to enter into any fresh contracts which the law allows." Here, under the Rent Law in force, one of the parties to the original contract,—namely, the tenant,—can hardly be said to be a consenting party to its rescission. Enhancement of rent is a condition incidental to his tenure of the land, but he can fairly claim a strict fulfilment of all the requirements of the law before any enhancement of rent can be imposed upon him. The law, s. 14, Beng. Act VIII of 1869, directs that no under-tenant shall be liable to pay any higher rent for the land held by him unless a written notice shall be served on him at a time and in a manner specified by order of the Collector on the application of the person to whom the rent is payable. It seems to me, therefore, to follow as a necessary corollary of the judgment of the Full Bench, that the person to whom the rent is payable is not the single sharer, the plaintiff in the suit, but all the sharers in the tenure. If the original contract as to the entire rent cannot be broken and a new contract entered into without the presence of the co-sharers, this is so because the tenure continues one and the same as a joint property, the only difference between the new contract and the old being a modification in the amount of rent to be paid by the tenant. If, therefore, the rent of one sharer can only be raised by a re-adjustment of the entire rent of the tenure, then clearly the notice of enhancement prescribed by the Act is defective, if it be not served on the application of all the co-sharers in the tenure. It is quite conceivable that a sharer in a joint undivided tenure may be unwilling to raise the share of the rent which has hitherto been paid to him separately, and yet object to his co-sharer, in a suit brought for the purpose, raising his quota of rent in a certain proportion on his share.

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But inasmuch as the re-adjustment of the rent to which he agrees does not affect the terms on which the tenant holds the tenure equally from him and his co-sharer, it is necessary, before

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any such re-adjustment of rent can be made, that he, as well as his co-sharer, should sign the notice and apply to have it served upon the tenant. So again, in any fresh adjustment of the rent by which he desires to raise his quota of rent to the level of that of his co-sharer, such co-sharer must, I conceive, join with him in the notice to be served on the tenant. No doubt, a new and separate tenancy is created by the new contract of lease, but from the very nature of the case the contracting parties continue the same, and the tenure remains as before, a joint undivided property. In this view the suit of the plaintiff must fail, because the notice of enhancement required by law has not been served on the tenant on the application of all the persons to whom the rent is payable. The appeal is dismissed, with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice White and Mr. Justice Field.

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 July 31.

SAMSHERE KHAN AND OTHERS v. THE EMPRESS.*

Riot — Unlawful Assembly — Culpable Homicide — Fight between two contending Factions, each armed with Deadly Weapons—Penal Code (Act XLV of 1860), s. 300, except. 5.

Where death results in a fight between two bodies of men deliberately fighting together, a greater proportion of the men composing both sides being armed with deadly weapons, and it being further apparent from the evidence that the man slain was an adult, and that no unfair advantage was taken by the one side or the other during the fight, the offence committed is culpable homicide, but does not amount to murder.

THE facts of this case sufficiently appear from the judgments.

Mr. Wood and Mr. Bonnerjee (with them Baboo Nulit Chunder Sein, Baboo Jogesh Chunder Roy, and Munshee Sirajul Islam) for the appellants.

Baboo Doorga Mohun Das for the Crown.

* Criminal Appeal, No. 408 of 1880, against the order of T. M. Kirkwood, Esq., Sessions Judge of Mymensing, dated the 21st April 1880.

The following judgments were delivered :—

WHITE, J.—This is an appeal against the conviction of the five appellants, named Samshere Khan, *alias* Sirdar, Abdul Rohoman Moonshee, Saheb Khan, Uasimuddi Meah, and Fakiroollah Khan, for murder committed in the course of a riot, for which offence they have been severally transported for life.

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The evidence extends to a very great, and in my opinion a very unnecessary, length. It is full of repetitions, and yet the inquiry in some important respects has not been as searching as it might have been. It is clear, however, that a very serious riot took place in a village called Latshailla on the morning of the 17th January of this year, which resulted in the wounding of one man and the death of another. Two of the shareholders of a portion of a share in the village, named Kurreem Sirdar and Dost Mahomed, having quarrelled about their share, sold each of them a fraction of his share to two rival zemindars, Khan Saheb and Dwarkanath Roy, with the object of enlisting two powerful neighbours in the dispute. The purchase by Khan Saheb was taken in the name of his son Hafiz. It would appear that Kurreem Sirdar, when he sold, was not in possession of his share, and that Khan Saheb, shortly before the riot took place, had been taking steps to get possession of the fractional part which he had bought, and for that purpose had erected a cutcherry on the land of the prisoner Fakiroollah, who is described as a small talukdar in the village, and who had become a partisan of Khan Saheb. This step was followed very soon afterwards by the introduction of some lathials into Fakiroollah's bari. On the morning of the 17th of January, Dost Mahomed also collected a number of persons in his homestead. As to the origin of the riot, which took place on that morning between the two partisans, we think that the most reliable evidence is that of Nobi Bux, the constable, who had, some days previously, been deputed by the authorities to keep peace in the village, and who was on the spot whilst the riot was going on. From his evidence it appears, that Dost Mahomed and some of his party came down that morning to Fakiroollah's bari; that the constable, then seeing preparations being made on both sides, which led him to believe that a breach of the peace was imminent,

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had a report drawn up, which he forwarded to the thannah, with a request that the Inspector of Police would attend, but before the Inspector could arrive, the two factions, with armed men on both sides, met in conflict in a field of Dhanoo Sircar, just outside the borders of Fakiroollah's bari. After a short fight, Gariboolla, who was one of Dost Mahomed's party, was wounded in the stomach with a spear. Upon this Dost Mahomed's party fled eastward to a jack tree, about fifty yards off, pursued by Khan Saheb's party; that there Dost Mahomed's party were reinforced by some more partisans armed with spear and latties, when Khan Saheb's party, in their turn, took to flight, but having fled about eighty yards, were rallied near some mangoe trees. The fight then recommenced, and very soon afterwards a man named Khoaz, who also belonged to Dost Mahomed's party, was killed. A great deal of argument has been addressed to us to show that Khan Saheb's party was a lawful assembly collected together for the defence of the cutcherry, which had been erected on Fakiroollah's land. It may be that there was a motive of defence in collecting the party in the first instance, but judging them from their acts and conduct, and from what subsequently took place, we think there can be no reasonable doubt that they were originally assembled for purposes of offence as well as defence; that the purpose was, by means of criminal force, to enable Khan Saheb to assert his right, or supposed right, of collecting the rents of the share which he had bought; and that when, on the morning of the 17th, knowing that Dost Mahomed had collected a band of men to oppose them, and that he and some of his partisans had come down to Fakiroollah's bari with hostile intentions against them, they issued armed from Fakiroollah's bari, they so issued with a common object of fighting Dost Mahomed's party. The evidence, no doubt, shows, that Dost Mahomed's party were in a manner the aggressors on that morning, and had done acts for the express purpose of provoking Khan Saheb's party to come forth from Fakiroollah's bari, or which at least were calculated to provoke the latter; but on the other hand it is clear that Khan Saheb's party were quite willing to accept any challenge from Dost Mahomed or his party. The members of the two assemblies; or a large portion on each side,

were armed with deadly weapons, such as latties and spears, and on the side of Khan Saheb's party, at least there was a large number of professional fighting men. We look upon what took place, from the time that Khan Saheb's party issued from the bari until the death of Khoaz, as one continued fight, although it consisted of more than one stage; and we think that it was in the prosecution of the common object of fighting that Gariboollah was wounded and Khoaz killed.

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We have not now before us the persons who actually inflicted the grievous hurt on the one and the death-wound on the other, but before considering the extent to which the five prisoners are responsible for what occurred, we will state the view that we take of the crimes committed by the wounding and killing.

As regards the wounding of the man Gariboollah, we consider that that has been proved most satisfactorily to be grievous hurt. The wound was a spear-wound, which penetrated the skin of the abdomen. It was a severe wound, and resulted in the man being, as the doctor proves, more than twenty days in hospital. But for the interposition of Providence, the man might have lost his life, for, if the spear had entered the abdomen, it probably would have ended in death.

With regard to the man who was killed, we are of opinion that the offence committed by killing him is culpable homicide, but does not amount to murder, inasmuch as Khoaz was an adult, and his death occurred in the course of a fight between two bodies of men who were deliberately fighting together, both sides being armed, or a greater part of the men on both sides being armed, with latties or spears, which are deadly weapons, and no unfair advantage appearing upon the evidence to have been taken by the one side over the other in the course of the fight.

On this point, I would refer to the case of *The Queen v. Kukier Mather* (1), decided on the 13th November 1877 by a Bench, of which I was a member. In that case I considered at some length what was the character of the offence where death was caused under circumstances similar to the present. I then held that the offence did not amount to murder, because it

(1) Unreported.

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came within the 5th exception to s. 300 of the Indian Penal Code. After alluding to the difference between the English and Indian law on the subject as regards voluntary culpable homicide by consent, I said:—“A man who, by concert with his adversary, goes out armed with a deadly weapon to fight that adversary who is also armed with a deadly weapon, must be aware that he runs the risk of losing his life; and as he voluntarily puts himself in that position, he must be taken to consent to incur the risk. If this reasoning is correct as regards a pair of combatants, fighting by premeditation, it equally applies to the members of two riots or assemblies who agree to fight together, and of whom some on each side are, to the knowledge of all the members, armed with deadly weapons.”

Some of the Judges of this Court entertain a different view from mine (1) as to the applicability of the 5th exception to a case of a premeditated fight for two reasons,—*first*, because the party who is killed does not intend to get himself killed if he can help it. But the language of the exception is not confined to the case where a man consents to suffer death, but extends to the case where he consents to take the risk of death. Although it was Khoaz's intention to escape death if he could, yet he not the less ran the risk of death when an armed man he joined in encountering armed men, and he did this voluntarily, and therefore with his own consent.

The *second* reason is, because sudden fight forms the subject of an express exception, namely the 4th exception. Hence it is argued that the Legislature could not have intended that premeditated fight was one of the cases prescribed for by the 5th exception. This argument does not appear to me to be based upon a sound construction of the 5th exception. Consent voluntarily given by an adult, implies in every case premeditation. In *suttee*, which, according to the universal opinion, falls within the 5th exception, the widow deliberately intends to die by burning, and the relative who fires the funeral pyre, on which the widow mounts, deliberately and with the utmost premeditation, does an act with the intention that the widow shall be burned to death. There is nothing, therefore, in the

(1) See *Empress v. Rohimuddin*, I. L. R., 5 Cal., 31.

fact that the fight is premeditated, which ought to exclude it from the operation of the 5th exception. If, as I think, according to the common and natural meaning of the words, an armed man, who deliberately fights with another man whom he knows also to be armed, consents thereby to take the risk of death, why is the adversary who kills him to be excluded from the benefit of the 5th exception, because by another exception the case of a man who kills his adversary in the course of sudden fight is specially provided for. The circumstances under which a man slays his opponent in sudden fight are different from those where he slays him in premeditated fight, and if the Legislature intended that the offence of both should be only culpable homicide, the intention would naturally be shewn by the enactment of two distinct exceptions. Again, sudden fight is a distinction recognised by the English law of homicide, and the framers of the Code may easily be supposed to have for that occasion alone made sudden fight the subject of a distinct exception, without imputing to them the intention thereby implied, by excluding from the 5th exception a case of premeditated fight, if it actually falls within the meaning of the exception. The sound construction to my mind is, that the 5th exception extends to all cases of death occasioned by, or resulting from, premeditated acts, where the party killed takes the risk of the death with his own consent; and that the 4th exception is an independent exception, applying to all cases of death occurring in the course of sudden and unpremeditated fight, and does not in any way bind the natural operation of the 5th exception.

(The learned Judge then went into the evidence as to the share each of the prisoners had taken in the riot, and varied the order of the Sessions Judge.)

The convictions and sentences passed by the Sessions Judge will therefore be set aside, and the convictions and sentences which I have mentioned above will take their place.

FIELD, J.—I concur in the judgment which has just been delivered. I think that it is very clear that, on the morning of the 17th, a considerable number of armed lathials were collected in

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the village on the part of Khan Saheb, and a considerable number on the part of Dost Mahomed.

* What actually occurred was this :—The constable having paid a visit to Dost Mahomed's bari, and having had reason to believe that a number of men were collected there, went over to Fakiroollah's bari, and there found the same state of things. It appears that a number of Dost Mahomed's people followed the constable, and took up a position on certain land belonging to one Dhunnoo Sircar, south of, and immediately adjoining, the homestead land of Fakiroollah. When the constable, having had a report written, and having sent it to the thannah by Bhugwan Chowkidar, came out of the cutcherry recently erected on Fakiroollah's land, south of his bari or homestead, Dost Mahomed represented to him that a number of armed men were collected within the homestead of Fakiroollah, and urged him (the constable) to arrest them. When the constable hesitated to do so, Dost Mahomed called his own men to assist him in carrying out his expressed intention of doing so himself. It would appear either that a considerable number of Dost Mahomed's men had remained behind at Dost Mahomed's bari, or that Dost Mahomed had miscalculated the strength of Fakiroollah's party. Be this as it may, Fakiroollah's people did not wait for Dost Mahomed's men to come on Fakiroollah's land, but they took the initiative, and crossed the boundary line into the land of Dhunnoo Sircar, and there the riot commenced, and first took place.

Under these circumstances I think it is impossible to say that Khan Saheb's party were acting on the defensive merely, or, in other words, were acting in the exercise of the right of private defence of person or property. It is quite clear that both parties were armed, and both parties were prepared to fight, and that a very trivial incident was sufficient to bring them into conflict. I think it is reasonable to say that, in entering upon that conflict, each party had for its object to fight for victory, and in doing so, knowingly and deliberately took upon itself the risks of the encounter; to this state of facts I agree that the 5th exception to s. 300 of the Penal Code is applicable, and I do not think it very material which party were, in the first instance, the actual aggressors, though this should be consi-

dered in awarding the punishment. When a man, being one of an armed band, and being himself armed with a deadly weapon, as there is evidence to shew that Khoaz, who was on this occasion killed, was armed, takes part in a fight, and uses that deadly weapon against his opponents, I think it is reasonable to say that he was, within the 4th clause of s. 300, committing an act which he knew to be so imminently dangerous, that it must, in all probability, cause death or such bodily injury as is likely to cause death; and I think further that he committed such act without any excuse for incurring the risk of causing death or such injury as has just been mentioned. When he and his party are opposed by a number of persons similarly armed, and using their arms in a similar way, I think it is reasonable to say that such person, within the meaning of exception 5, takes the risk of death with his own consent.

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Order as to conviction and sentences varied.

APPELLATE CIVIL.

Before Mr. Justice White and Mr. Justice Field.

IN THE MATTER OF THE PETITION OF SHIRISH CHUNDER MOOKHOPADHYA AND ANOTHER.*

1880

Aug. 25.

Order of Civil Court authorising Lease of Minor's Property—Act XL of 1858, s. 18.

On an application under s. 18 of Act XL of 1858 for leave to deal with the property of an infant, the Civil Court is bound to determine the question, whether the proposed mode of dealing with it would, if sanctioned, be for the benefit of such infant: and the petition should contain all the materials reasonably required to enable the Court to decide that question.

The decision of Garth, C. J., in *Sikher Chund v. Dulputty Singh* (1) followed.

THIS was an application by Nitumbini Debi, the mother and guardian of her two minor sons, for leave, under s. 18 of Act XL of 1858, to lease out certain lands, the property of the infants. The Civil Court, on such application, made the following

* Appeal from Order, No. 156 of 1880, against the order of J. F. Browne, Esq., Officiating Judge of the 24-Pargannas, dated the 27th April 1880.

(1) I. L. R., 5 Calc., 363.

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order:—"I decline to sanction the proposed lease; the guardian must act on her own responsibility." The applicant, thereupon, appealed to the High Court.

Baboo Hem Chunder Banerjee, Baboo Aubinash Chunder Banerjee, and Baboo Omakally Mookerjee for the appellant.

The judgment of the Court (WHITE and FIELD, JJ.) was delivered by—

WHITE, J.—This is an appeal against the order of the Judge of the 24-Pargannas, declining to sanction a lease, which sanction was applied for by Nitumbini Debi, as guardian of her two infant sons, under s. 18 of Act XL of 1858.

The case was opened to us as one in which the Court had refused to go into the question of whether the proposed lease was for the advantage of the infants or not; but the order, when read, shows that the Judge merely declined to sanction the lease, and having regard to the materials that were put before him in the petition, we cannot say that he was wrong.

In applications under s. 18 the Court is bound to go into the question, whether or not the proposed sale is one which it is for the benefit of the infant that the guardian should be empowered to execute. On this point we may adopt the language used by the present Chief Justice in *Sikher Chund v. Dulputty Singh* (1), where he says:—"The Civil Court has now not only the power, but it is bound, as I consider, under that section to enquire into the circumstances of each case, and to determine whether, as a matter of law and precedence, it is right that any proposed sale or mortgage of the minor's property should take place."

The petition in the present case contains a statement of the proposed lease on behalf of the infants, and that its execution is necessary in order to avert the disposal of the property by the creditors of the infants' father; but it is defective in not stating the amount of premium that is to be taken from the intended lessee, the amount of rent that is reserved by the patni lease, and the annual rent or profits which are at present derived from the property proposed to be leased.

(1) I. L. R., 5 Cal., 363, at p. 381.

The petitioner, therefore, did not furnish the District Judge with all the materials which he reasonably required in order to enable him to form a correct opinion as to whether the lease was for the benefit of the infants or not.

We must dismiss the appeal, but at the same time we think it right to intimate that this dismissal will not prevent a second application from being made to the District Judge under s. 18, based upon further and better materials; and that if these materials shew that the granting of the proposed patni lease is for the benefit of the infants, the Court should give the necessary power to the guardian to make or join in the grant. In dealing with these materials, the Court will consider the allegation of the guardian that the granting of the patni lease is necessary to avert the disposal of the property by the creditors of the infants' father.

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CRIMINAL REFERENCE.

Before Mr. Justice Tottenham and Mr. Justice Maclean.

THE EMPRESS *v.* NISTAR RAUR.*

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June 28.

Contagious Diseases Act (XIV of 1868), ss. 11, 21—Rules 13 and 27 passed under the Act—Magistrate, Competency of—Jurisdiction.

Any woman desirous of ceasing to carry on the business of a common prostitute is, under the provisions of the Indian Contagious Diseases Act, 1868, absolutely entitled to have her name removed from the register; and any rule, or portion of a rule, purporting to have been framed under the provisions of that Act which places any obstacle on the way of her doing so, is *ultra vires*, and therefore void.

Where a woman is prosecuted before a Magistrate under s. 11 of Act XIV of 1868, she is not precluded from pleading that she has ceased to be a common prostitute, and that she has taken steps, under s. 21 and the rules framed thereunder, for the removal of her name from the register; and the Magistrate is competent to entertain such a defence.

In the matter of Lakhimani Raur (1) approved.

* Criminal Reference, No. 106 of 1880, from B. L. Gupta, Esq., C. S., Presidency Magistrate of Calcutta, Northern Division, dated the 29th May 1880.

(1) 3 B. L. R., A. Cr., 70.

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THIS was a reference from the Presidency Magistrate for the Northern Division of Calcutta, in which it appeared that the defendant, Nistar Raur, was registered as a common prostitute under Act XIV of 1868, and her name was still borne on the register, which was produced in evidence before the Magistrate. She was several times convicted and fined for failing to appear in due time for periodical medical examination, and her fifth and last conviction was on the 23rd of March 1880.

It would seem, however, from the records of the Police office, produced in evidence, that, in February 1880, an application on behalf of Nistar was presented to the Deputy Commissioner of Police, informing him that she had ceased to be a common prostitute, and was living under the protection of a certain individual, and praying that her name might be removed from the register. The application was rejected. Later on, a second application on her behalf, claiming exemption on the same grounds, was presented to the Commissioner of Police by her attorney, Mr. Leslie, in person. A Police enquiry was ordered, and pending the result of such enquiry the woman presented herself for examination on one occasion. No orders on the petition were received for some time after this, and Mr. Leslie deposed that he made more than one attempt, but failed to obtain a hearing for his client. Upon this he intimated to the Commissioner that he would advise his client not to appear at her next examination, so that in case of a prosecution she might have an opportunity of contesting her rights before the Court. The result of these proceedings was the arrest of the woman by the Police without a warrant from any Magistrate, and this prosecution under s. 11. of the Act.

The first question raised related to the legality of the arrest. The Police are expressly authorized, by rule 27 of the Government rules, to arrest all registered women defaulting at the medical examination. But before the Magistrate it was contended that the rule itself, which purports to have been made under s. 11 of the Act XIV of 1868, was unauthorized by that Act, and was therefore *ultra vires*.

The next question raised related to the jurisdiction of the Magistrate in the case, and to the validity of rule 13 passed un-

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der s. 21 of the Act. Rule 13 provides that applications by women to have their names removed from the register should be made in writing to the Commissioner of Police, who, if satisfied, on enquiry, that the applicant has really ceased to practise as a prostitute, "may cause her name to be removed from the register." Neither the Act nor the rules indicate any other mode by which a woman once registered may procure her exemption, and the rules provide no appeal from the Commissioner's orders. It was contended, therefore, that the Commissioner's orders were final, and the Magistrate had no jurisdiction to go into the question as to whether the woman had ceased to be a common prostitute. On the other hand it was contended, that s. 21 of the Act confers an absolute right on every registered woman to withdraw her name at her option from the register, and leaves it to the Government only to prescribe the procedure or mode by which she may do so; so that as no woman's name, not even that of a declared common prostitute, can be placed on the register against her will, or without her consent; so no woman's name can continue on the roll after she has, in the manner prescribed by Government, applied for the removal of her name; and that if a woman, after the removal of her name from the book, still continues to carry on the business of a common prostitute, the only course left to the Police is to prosecute her for each repetition of the offence under s. 4 of the Act. It was, therefore, urged that rule 13, investing the Commissioner of Police with a discretionary power to reject applications made under s. 21, was inconsistent with the real import of that section, and therefore null and void. The ruling of the High Court in *In the matter of Lakhimani Raur* (1) was referred to.

On the evidence before him, the Magistrate found, as a fact, that the accused had ceased to be a common prostitute within the meaning of the Act; and he referred the following questions of law for the opinion of the High Court under s. 240 of Act IV of 1877:—

1st—Is rule 27 of the rules passed by the Government of Bengal, under Act XIV of 1868, valid in law; and is a woman registered under that Act legally liable to arrest by a Police

1880 officer without a warrant, for omitting to attend at the periodical
 EMPRESS medical examination ?

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2nd—Is rule 13 of the said rules consistent with the Act, and can the Commissioner of Police, in his discretion, lawfully refuse to remove from the register the name of a woman who declares herself desirous of ceasing to practise as a common prostitute, and applies for such removal ?

3rd—In either case, is a registered woman, whose application to the Commissioner of Police for the removal of her name from the register has not met with success, precluded from pleading before the Magistrate, on a prosecution under s. 11 of the Act, that she is not, or has ceased to be, a common prostitute, and is the Magistrate competent to enquire into such a plea ?

Mr. R. Allen and Mr. R. N. Mitra for Nistar Raur.

The following judgments were delivered :—

MACLEAN, J.—This is a reference made by one of the Presidency Magistrates of Calcutta, under s. 240, Act IV of 1877, submitting for the opinion of the Court three questions of law arising out of a prosecution under Act XIV of 1868, s. 2.

The first question raises a point which does not affect the case before the Magistrate, who has to decide whether the person charged before him has committed the offence imputed. We think it unnecessary to express any opinion on this point.

We think that, as every woman registered under the Act has an absolute right to have her name removed “from the book,” if she is desirous of ceasing to carry on the business of a common prostitute, any rule which raises any obstacle to the exercise of that right is not in accordance with s. 21 of the Act. Part of the 13th rule referred to by the Magistrate, commencing “may postpone” and ending “satisfied he,” appears to be *ultra vires*. We answer the second question in the negative.

The third question refers to the Magistrate’s competency to entertain a woman’s plea that she is no longer lawfully retained on the register, and is therefore not liable to be punished for breach of the rules applicable to registered women. In our opinion, a woman prosecuted for an offence under s. 11 is not pre-

cluded from pleading that she has ceased to carry on the business of a common prostitute; that she has taken the steps prescribed by s. 21 and the rules framed in accordance therewith to obtain the removal of her name from the register; and that, if it is still retained there, it is retained contrary to law. This opinion is, we think, supported by the authority of this Court in the case to which the Magistrate refers—*In the matter of Lakhmani Raur*(1). It was there held, that the Magistrate was bound to enquire into the plea that the woman before him had not been lawfully registered, because she had not consented to it; and on the same principle, we think that, in the present case, it is the Magistrate's duty to determine whether or not the woman has been lawfully retained upon the register; and if not, whether she had, in fact, ceased to carry on the business of a common prostitute or not when the proceedings were taken against her.

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TOTTENHAM, J.—I have no doubt that rule 27 is legal in authorizing arrest without warrant, but the Magistrate cannot go into this question. I think that rule 13 is beyond the scope of s. 21 of the Act in allowing the Commissioner of Police to retain a woman's name on the register as long as it pleases him to do so. I read the law as leaving it at the option of the woman to be put on the register and to remain on it. She comes off at her own peril, but there is no authority given by law for keeping her name on the register against her will.

I also think that a woman brought before the Magistrate for breach of rules under s. 11 of the Act is entitled to plead that she has conformed to the procedure by Government under s. 23 of the Act; that she is not a common prostitute; and that if she is still on the register, she is kept there against the law, and is not liable to be punished for neglecting to attend for examination. The Magistrate, I think, should acquit her if he finds her plea to be true.

APPELLATE CIVIL.

Before Mr. Justice White and Mr. Justice Field.

1880
Aug. 11.

NUBBI BUKSH (JUDGMENT-DEBTOR) v. CHASNI
(DECREE-HOLDER).*

Appeal—Insolvency—Refusal to grant Application to be declared Insolvent—Code of Civil Procedure (Act X of 1877), ss. 351, 588, cl. 17.

An order refusing to grant an application to be made an insolvent, is appealable under cl. 17, s. 588 of the Code of Civil Procedure.

Such an order must be considered to be one made under s. 351.

Juggutjeebun Gooptoo v. Haro Coomar Pal (1) dissented from.

THE facts relevant to this report sufficiently appear in the judgments of the Court.

Baboo *Aushootosh Dhur* and *Munshee Serajul Islam* for the appellant.

Mr. *H. Bell* and Mr. *Trevelyan* (with them Baboo *Bama Churn Banerjee*, Baboo *Aukhil Chunder Sen*, and Baboo *Juggut Chunder Banerjee*) for the respondent.

The judgments of the Court (WHITE and FIELD, JJ.) were as follows :—

WHITE, J.—This is an appeal against an order of the Officiating Judge of Dacca, refusing an application, on behalf of Nubbi Buksh Bepari, to be declared an insolvent under s. 351 of the Code of Civil Procedure.

A preliminary objection is taken, that the appeal does not lie : *first*, on the ground that the order being one of refusal is not made under s. 351 ; and *secondly*, because, if made under that section, no appeal lies against an order of refusal, but only against an order granting the application.

Section 588, cl. 17, of the Code gives an appeal against an order under s. 351 in these words—“orders in insolvency matters

* Appeal from Order No. 98 of 1880, against the order of R. F. Rampini, Esq., Officiating Judge of Dacca, dated the 29th March 1880.

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under s. 351." Now, as regards the first objection, I think that the order under appeal, although one of refusal, was made under s. 351. This is the only section under which the District Court can deal with an application by an insolvent judgment-debtor to be made an insolvent. Neither that section, nor any other section in the chapter, expressly authorises the Court to refuse the application; but from the language of the 351st section, as well as from the nature of the case, it is obvious that the Court has such power, for s. 351 directs that the Court may, if satisfied as to certain particulars, declare the applicant to be an insolvent, which implies that, if not so satisfied, the Court may refuse the application. It appears to me to follow from these data that an order refusing an application is as much made under s. 351 as an order granting an application, unless the former order can be supposed to be made under no section of the Code, which could not, I apprehend, be seriously contended.

Taking the order to be made under s. 351, the second objection cannot, in my opinion, prevail against the natural meaning of the words used in cl. 17 of s. 588. The words "orders in insolvency matters under s. 351" are wide enough to embrace any order made under that section, whatever its nature may be; and an order made by a Court in the course of disposing of an application is not the less the order of the Court because it refuses the application. Where the Legislature intended to confine the right of appeal to one species of order, it has used clear, and appropriate words, as for instance, in cl. 27 of s. 588, where an appeal is only given in respect of orders of refusal under s. 558. This question has been the subject of decision by more than one Bench of this Court. In the earlier decision—*Mumtaz Hossein v. Brij Mohun Thakoor* (1)—the objection was disallowed. Mr. Justice Jackson, who pronounced the judgment of the Court, says:—"It appears to us that the term 'insolvency matter' is purposely wide so as to include any question arising out of the exercise of the functions entrusted to the Courts under the section specified." That decision, and the reasons upon which it is founded, commend themselves to our judgment. The second decision was passed about a year and

1880 a quarter afterwards—*Juggutjeebun Gooptoo v. Haro Coomar*
 NUBBI — *Pal* (1). In this decision the objection prevailed, but I am un-
 BUKSH able to gather from the report the precise ground upon which
 v, it was allowed to do so. It is to be observed that the earlier
 CHASNI. decision of Mr. Justice Jackson and Mr. Justice McDonell was
 not cited. Under these circumstances I think that we are at
 liberty to act upon that authority, which appears to us to be
 most in conformity with the true construction of cl. 17, s. 588.

For these reasons, we are of opinion that an appeal lies to this Court against the order refusing to declare Nubbi Buksh an insolvent.

(The learned Judge then went into the evidence in the case, and dismissed the appeal on the merits.)

FIELD, J.—In this case a preliminary objection has been made that no appeal will lie. In other words, it is contended, that an order refusing to declare a person an insolvent does not come within the meaning of the words “orders in insolvency matters under s. 351” in cl. 17, s. 588 of the Code of Civil Procedure. Section 351 is as follows:—“If the Court is satisfied that, &c..... the Court may declare him” (*i. e.*, the applicant) “to be an insolvent.” This section contains no express provision empowering the Court to refuse an application made by a judgment-debtor asking to be declared an insolvent, and I may add that no such express provision is to be found in any other section of the Code. The question then arises, under what section does the Court make an order refusing to declare a person to be an insolvent. That it has power to make this order there can be no doubt.

It appears to me that, although the provisions of s. 351, in their express language, empower the Court to make an affirmative order only, yet, by necessary implication, they must be understood to give the Court the further power to make a negative order,—*i. e.*, an order refusing to declare the applicant to be an insolvent; and that an order refusing to declare an applicant to be an insolvent is, therefore, made under s. 351. If cl. 8 of s. 588, read with s. 103 of the Code,—cl. 9 of s. 588, with s. 108,—cl. 7 of s. 588, with s. 111,—cl. 19 of s. 588, with s. 370,—

cl. 20 of s. 588, with s. 371,—cl. 21 of s. 588, with s. 372,—and cl. 27 of s. 588, with ss. 558 and 560,—it will be abundantly manifest (more especially as regards ss. 371, 558, and 560) that orders refusing to grant applications under certain sections of the Code are understood to be made under those particular sections which expressly confer the power only of granting applications, and do not contain express words authorising the Court to make orders refusing such applications. I think further that this interpretation is supported by the construction put by their Lordships of the Privy Council upon the 76th section of the Registration Act in the case of *Reasut Hossein v. Hadjee Abdoolah* (1).

I concur in the judgment which has just been delivered on the merits.

Appeal dismissed.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, Mr. Justice Pontifex, Mr. Justice Morris, and Mr. Justice Mitter.

GUJJU LALL (DEFENDANT) v. FATTEN LALL (PLAINTIFF).*

Evidence Act (I of 1872), ss. 13, 40, 41, 43—Admissibility in Evidence of Judgments not “inter partes.”

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June 1.

Per GARTH, C. J., JACKSON, PONTIFEX, and MORRIS, JJ. (MITTER, J., dissenting).—A former judgment, which is not a judgment *in rem*, nor one relating to matters of a public nature, is not admissible in evidence in a subsequent suit, either as a *res judicata*, or as proof of the particular point which it decides, unless between the same parties or those claiming under them.

In a suit between *A* and *B*, the question was, whether *C* or *D* was the heir of *H*. If *C* was the heir of *H*, then *A* was entitled to succeed; otherwise not. The same question had been raised in a former suit brought by *X* against *A*, and decided against *A*; and this former judgment was admitted in evidence in the suit between *A* and *B*, and dealt with by the Courts below as conclusive evidence against *A* upon the point so decided.

Held (MITTER, J., dissenting) that the former judgment was not admissible as evidence in the suit between *A* and *B*, either as “a transaction” under s. 13, or as “a fact” under s. 11, or under any other section of the Evidence Act.

* Full Bench on Special Appeal, No. 2307 of 1878.

(1) L. R., 3 I. A., 221, at pp. 225, 226; S. C., I. L. R., 2 Calc., 131, at p. 137.

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THIS was a suit to recover possession of certain property, the ultimate determination of which suit in favor of the plaintiff depended on the admission in evidence of a certain judgment in a former suit, to which the present plaintiff was no party, but in which the present defendant was the plaintiff. The question as to whether this judgment should have been admitted in evidence was referred by GARTH, C. J., and MITTER, J., to a Full Bench in the terms of the following order:—

GARTH, C. J.—This special appeal depends upon a question of law, which we think should be referred to a Full Bench.

It was admitted on both sides in the lower Courts, that if Sham Behari Lall survived Mussamut Sheo Bucham Koer, then the plaintiff was the nearest heir of Bhichuk Lall, and as such was entitled to succeed; but if, on the other hand, Mussamut Sheo Bucham Koer survived him, then he was not so entitled.

In the Court of first instance, the plaintiff relied upon a judgment in a former suit, dated the 26th of June 1876, in which the question was raised between Gujju Lall, the present defendant (who was the plaintiff in that suit), and Janki Singh and others (the defendants in that suit), whether Gujju Lall or Sham Behari Lall was the nearest heir of Bhichuk Lall. It was decided in that suit that Sham Behari Lall was the nearest heir of Bhichuk Lall. In this suit it was contended by the defendant in both the lower Courts, that the judgment in the former suit could not be used as evidence in this suit, because the present plaintiff was no party to the former proceedings; while the plaintiff, on the other hand, contended that the former judgment was admissible in evidence under s. 13 of the Evidence Act, as being a transaction by which the right claimed in this suit by the plaintiff was asserted and denied. Both the Courts considered the judgment admissible in evidence, and upon the strength of it decided in the plaintiff's favor.

It has now been contended before us on special appeal, that the lower Courts were wrong in admitting the former judgment as evidence in this case, and upon this one point the special appeal depends.

It has been decided by this Court in several cases, three of which are reported in 23 W. R., pages 162, 293, and 311, that decrees in suits between third parties are admissible in evidence under s. 13 of the Evidence Act, whilst in other cases in this Court such evidence has been constantly rejected.

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The question, therefore, referred to the Full Bench is, whether, under s. 13, or any other section of the Evidence Act, the judgment in the former suit, which was admitted and acted upon as evidence in this suit, was legally admissible?

Mr. M. Ghose (with him Baboo Jogesh Chunder Dey) for the appellant.—The status of heirship was really determined in the former suit between the defendant in the present suit and a stranger. It was not intended that the words “existence of a right or custom,” used in s. 13 of the Evidence Act, should include any and every right. The Evidence Act did not alter what was the previous law on the subject,—viz., the English law. It was intended by this section to include the class of cases such as right of ferries and roads, and all cases in which judgments *inter alios* are admissible. All that s. 13 of the Act has done, is to adopt Sir Barnes Peacock’s judgment in *Kanhya Lall v. Radha Churn* (1). [GARTH, C. J.—The rule in England only applies to public rights.] It will probably be contended by the other side that, under s. 43, the judgment is admissible. Before the Evidence Act was passed, such judgments were not admissible in evidence, and it was not the intention of the framers of the Act to make any alteration. Clause 4 of s. 32 also shows that the right or custom must be a public right or custom. I contend that the word “right” means a right of a public character or of a *quasi*-public character. Under s. 13 this judgment is not evidence. The cases on which the other side relies are *Neamat Ali v. Gooroo Doss* (2) and *Guttee Koiburto v. Bhukut Koiburto* (3), but the judgments there appear to be *inter partes*. The case of *Hunsa Koer v. Sheo Gobind Raot* (4) was the case of an *ex parte* decree, and that was held as admissible in

(1) B. L. R., Sup. Vol., 662; S. C., 7 W. R., 338.

(2) 22 W. R., 365.

(3) *Id.*, 457.

(4) 24 W. R., 431.

1880 evidence "*quantum valeat*." *Naranji Bhikhabhai v. Di-*
 GUJJU LALL *paumed* (1) points out that such judgments as the one in ques-
 FATEH tion are at best not conclusive evidence; see also *Jogendro*
 LALL. *Deb Roy Kut v. Funindro Deb Roy Kut* (2), in which the
 decision of the Full Bench in the case of *Kanhya Lall v. Radha*
Churn (3) is adopted. There are also cases since the passing
 of the Evidence Act, in which judgments *inter partes* have
 been rejected. [GARTH, C. J.—Section 91 of Vol. I of Taylor
 on Evidence (7th ed.) lays down "that such judgments are not
 admissible, except by way of demurrer or estoppel."]]

Baboo *Mohesh Chunder Chowdhry* for the respondent.—
 Although the present plaintiff was no party to the judgment in
 question, yet the defendant was; and the Evidence Act did not
 intend to exclude as evidence all judgments which do not come
 under s. 40. The case of *Lala Ranglal v. Deonarayan*
Tewary (4) points out that such a judgment as the present is
 admissible.

The opinion of the Full Bench was as follows:—

MITTER, J.—In this case I have the misfortune to differ
 from his Lordship the Chief Justice and my other colleagues.
 But the importance of the question referred to the Full Bench,
 and the fact that the majority of the decided cases on the point
 are in favor of the view I take, I apprehend, justify me in
 stating fully the grounds of the conclusion at which I have
 arrived.

Sections 40 to 43 of the Evidence Act deal with the subject
 of relevancy of judgments, orders, or decrees of Court. Sec-
 tion 40 provides that the existence of a judgment, decree, or
 order is a relevant fact, if it by law has the effect of preventing
 any Court from taking cognizance of a suit or of holding a trial.
 Section 41 deals with what are usually called judgments *in*
rem; and by s. 42 judgments relating to matters of a public
 nature are declared relevant, whether between the same parties
 or not. Then s. 43 provides that "judgments, orders, or

(1) I. L. R., 3 Bom., 3.

(3) B. L. R., Sup. Vol., 662; S. C.,

(2) 14 Moore's I. A., 367; S. C., 7 W. R., 338.

11 B. L. R., 244.

(4) 6 B. L. R., 69.

decrees, other than those mentioned in ss. 40, 41, and 42, are irrelevant, unless the fact that such a judgment, order, or decree existed is relevant under some other provision of this Act." 1880
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It is clear that the judgment mentioned in the order of reference is not relevant under ss. 40 to 42. Therefore the question that we have to determine is, whether or not it is relevant under some other provision of the Evidence Act, so as to bring it within the proviso of s. 43.

I am of opinion that it is relevant both under ss. 11 and 13. I shall deal with the question of its relevancy under s. 13 first. That section provides:—

“When the question is as to the existence of any right or custom, the following facts are relevant:—

(a.) Any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence.

(b.) Particular instances in which the right or custom was claimed, recognized, or exercised, or in which its exercise was disputed, asserted, or departed from.”

The existence of a right to some immoveable property is in question in this case. That right was asserted and recognized in a previous proceeding of a Court of Justice, and it seems to me that it would not be unwarrantably straining the language of the section in question to say, that that proceeding was “a transaction” within the meaning of s. 13; because the word “transaction” in its largest sense means “that which is done.”

If the words “transaction” and “right” be not construed in this way, judgments, decrees, and orders which were, before the passing of the Evidence Act, considered conclusive, and which now, according to the law of evidence as administered in England, are considered, when not pleaded as estoppel, cogent evidence, would be excluded. Take for example the following illustration:—*A* brings a suit against *B* for enhancement of rent. *B* sets up a mukurrari potta in defence. A Court of competent jurisdiction finds the potta to be genuine, and dismisses the suit. After the lapse of several years, *B* sells his right to *C*, and *A* then ejects the latter forcibly. Thereupon

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C brings a suit against *A* to recover possession of the land covered by the mukurrari potta. *A* denies the mukurrari right, and alleges that *B* was a tenant-at-will. Before the Evidence Act was passed, the former judgment would have been conclusive evidence of *B*'s mukurrari; see *Soorjomonee Dayee v. Suddanund Mohapatter* (1) and *Krishna Behari Roy v. Brajeswari Chowdhranee* (2). According to the law of evidence as at present administered in England, it would equally be considered conclusive, and, if not conclusive, at least as cogent, evidence in the subsequent suit. See Taylor on Evidence, section 1497.

Was it intended by the Evidence Act to declare such judgment as this irrelevant? But it would be irrelevant, unless it be relevant either under s. 11 or s. 13. It is not relevant under s. 40, because its existence does not by law prevent the Court from "taking cognizance of the second suit." In the second suit it is the plaintiff who would seek to use it as relevant evidence, and it is apparent that he would not rely upon it to bar the cognizance of his own suit. It may be said that, under s. 13 of the present Procedure Code, the existence of the first judgment would prevent the Court from holding a trial of the issue as to the mukurrari right of *B*, and would therefore be relevant under s. 40. Supposing that the word "trial" in the section in question refers not only to a criminal trial, but also to a "trial" of an issue in a civil suit, the judgment in question would not have been relevant under this section before the present Procedure Code was passed, because, under s. 2 of Act VIII of 1859, it would not have prevented any Court from holding a trial of the issue as to the mukurrari title in the second suit. Then again, suppose in the second suit the judgment in question was not produced at or before the trial, and evidence bearing upon this issue was allowed to be adduced. Then suppose at a later stage of the case, the plaintiff produced the judgment in question and satisfied the Court, that, in the exercise of its discretionary power, it ought to receive it. Under these circumstances, I apprehend it would not be admissible under s. 40 of the Evidence Act, because its existence would and could not at that stage

(1) 12 B. L. R., 304. (2) L. R., 2 I. A., 283, S. C., I. L. R., 1 Calc., 144.

of the case prevent the Court from holding a trial of the issue regarding *B's* mukurrari title.

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The judgment in question then, at least in some cases, not being admissible under s. 40, and it being evident that it is not admissible under ss. 41 and 42, it would be excluded altogether, unless its existence be relevant under some other provision of the Act. But if we construe the words "transaction" and "right" in s. 13 in their largest sense, it would be relevant under that section.

But it has been said that the law of evidence as administered in England, was the law of evidence in force in this country before the Evidence Act was passed; that the judgment of the description mentioned in the order of reference is and was not admissible under English law; and that if the Legislature intended to alter the law in this respect, it would have done so by a more clear and express provision than what is contained either in s. 11 or s. 13.

But I apprehend that the law of evidence as administered in England was not, in its integrity, the law in force in this country before the passing of the Evidence Act. The statutory provision on this subject was contained in the second paragraph of s. 24 of Act VI of 1871, which is to the following effect: "In cases not provided for by the former part of this section or by any other law for the time being in force, the Court shall act according to justice, equity, and good conscience." This is only a re-enactment of the provision of s. 15 of Regulation III of 1793. Therefore, so far as the legislative enactments go, there is no foundation for this proposition.

Upon an examination of the decided cases on the subject, it would be found to be equally untenable.

The question was fully discussed by Mr. Justice Markby in *Doorga Doss Roy Chowdhry v. Norendro Coomar Dutt Chowdhry* (1), and he came to the conclusion that the rule of English law was not applicable "in all its strictness" to mofussil Courts in this country. I may as well cite here the observation of the Judicial Committee upon this point in the

1880 case of *Unide Rajaha Roje Bommarauze Bahadur v. Pemmasamy*
 GUJJU LALL *Venkataadry Naidoo* (1):—

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“With regard to the admissibility of evidence in the native Courts in India, we think that no strict rule can be prescribed. However highly we may value the rules of evidence as acknowledged and carried out in our own Courts, we cannot think that those rules could be applied with the same strictness to the reception of evidence before the native Courts in the East Indies, where it is perfectly manifest, the practitioners and the Judges have not that intimate acquaintance with the principles which govern the reception of evidence in our own tribunals; we must look to their practice; we must look to the essential justice of the case, and not hastily reject any evidence, because it may not be accordant with our own practice. We must endeavour, as far as the materials will allow us, having received the evidence, to ascertain what weight ought properly to be ascribed to it; and more especially where we find that it has been the practice of the Court to receive documentary evidence without the strict proof which might here be considered necessary; indeed, the consequence of so doing would inevitably be, if the strict rule were adhered to, to reject the most important evidence not only in this case, but almost in every other.”

In another case (2) the Judicial Committee observed that “the native Courts of India in receiving evidence do not proceed according to the technical rules adopted in England, and they would, by their usual practice, admit a copy of a public document authenticated by the signature of the proper officer, as *prima facie* evidence, subject to further enquiry if it were disputed.”

There is, therefore, no foundation for the proposition that, before the passing of the Evidence Act, the law of evidence as administered in England was applied with all its technical strictness to *mofussil* Courts in the country. On the other hand, they were guided by their own practice, which was to a great extent moulded on principles of substantial justice.

(1) 7 Moore's I. A., 128, at p. 137.

(2) *Naraguntly Lutchmeedavamah v. Vengama Naidoo*, 9 Moore's I. A., 66, at p. 90.

Acting upon this principle, the Courts in this country, before the passing of the Evidence Act, always held that judgments of the description mentioned in the order of reference were admissible in evidence. See *Doorga Doss Roy Chowdhry v. Norendro Coomar Dutt Chowdhry* (1) and *Lala Ranglal v. Deonarayan Tewary* (2). In this latter case, speaking of a judgment of the description mentioned in the order of reference, Mr. Justice D. N. Mitter says:—"That decisions like the one under our consideration have been frequently admitted in our Courts as evidence, is, I believe, a proposition beyond all dispute, and I do not see any reason why we should depart from this practice merely because it is opposed to the English law of evidence." The observation of Mr. Taylor in s. 1495 shows that, in his opinion also, the propriety of this rule of English law is questionable.

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The law of evidence as administered in England was not, therefore, in its integrity, the law in force in the mofussil Courts of this country, and according to the practice of these Courts before the passing of the Evidence Act, decisions like the one under consideration were admitted in evidence. It seems to me that we ought not to come to the conclusion that this rule of law, founded as it was on a long practice of the mofussil Courts, was altered by the Evidence Act, unless that was clearly made out by the provisions of the Act itself.

Then, again, if we do not construe s. 13 in the way I have suggested above, the result would be, that a class of judicial proceedings, which were always considered as furnishing cogent evidence on the question of possession, would be excluded. I refer to awards under Act IV of 1840, and the corresponding sections of the Criminal Procedure Code. They have been invariably acted upon as affording valuable evidence of possession, even after the passing of the Evidence Act. They would not be relevant under s. 40, because, apart from other grounds, a proceeding under Act IV of 1840 before a Magistrate cannot be called "a suit" within the meaning of s. 13 of the Civil Procedure Code. Then if these awards are not admissible either under s. 11 or s. 13, they would not be rele-

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vant at all. I would hesitate to come to the conclusion that the Evidence Act was intended to exclude this class of evidence, unless it was made out as clearly as possible from its provisions.

Then it has been said that, in s. 13 of the Evidence Act, the Legislature intended to refer to incorporeal rights only, because, in other parts of the Act, for example in ss. 32 and 48, where the same word occurs in conjunction with the word "custom," it has been used in that sense. In the first place, it is by no means clear that ss. 32 and 48 deal only with incorporeal rights. It is not impossible to conceive of a corporeal right being of a public or general nature. It is true that, in the generality of cases, such rights are incorporeal, but it is by no means confined to that class only. Then in the next place, the word "right" is qualified by the word "public" in cl. 4, s. 32, and by the word "general" in s. 48. There is no such qualification in s. 13.

Moreover, no reasonable ground can be suggested for the necessity of restricting the meaning of the word "right" in s. 13 to the class "incorporeal." The contention of the appellant does not go to the extent of limiting the section to incorporeal rights of a public nature only. In that case, no doubt, it could be explained upon the ground that such a construction would have the effect of assimilating the provisions of the Evidence Act to the rule of English law on this subject. But the contention that the section in question refers only to incorporeal rights, whether of a public or private nature, does not seem to me to be warranted by any general principle. It is difficult to suggest a reason which would justify the existence of a distinction between the rules applicable to the proof of corporeal and incorporeal rights, respectively, whether of a public or of private nature. Why should the transaction of the nature described in s. 13 be relevant when *A* claims a right of way over a piece of land held and owned by *B*, and not so when he claims the land itself, appears to me inexplicable. It seems to me that the distinction would be arbitrary. I may as well here state a special consideration which leads me to think that the Legislature, by the use of the word "transaction," intended to include proceedings of Courts also. Is it at all

reasonable to suppose that a mere assertion of a right by a person setting it up (whether that right is corporeal or incorporeal, it is quite immaterial for the purposes of this argument) would be admissible as evidence, and not the recognition of it by a Court of Justice? Certainly it seems to me to be highly improbable that that was the intention of the Legislature.

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For these reasons I am of opinion that the judgment mentioned in the order of reference is relevant under s. 13 of the Evidence Act.

Then, as regards its admissibility under s. 11, it has been said that a judgment is not a fact as defined in the Act itself. It is true that the reasons of a decision cannot be called "facts" within the meaning of the Evidence Act; but the result of a particular judgment, *i. e.*, whether it is favorable or unfavorable to a particular party, is, it seems to me, a fact as defined in that Act.

Illustration (d) of s. 43 is as follows:—"A has obtained a decree for the possession of land against B; C, B's son, murders A in consequence.

"The existence of the judgment is relevant as showing motive for a crime."

Now, the decree referred to in the illustration can only be relevant under ss. 7, 8 or 11. In all these sections I find the word used is "fact," consequently it follows that the word "fact," as defined in the Act itself, includes "decrees and judgments." Besides, the definition itself is comprehensive enough to include them.

If therefore the word "fact," as defined in the Evidence Act, is comprehensive enough to include decrees and judgments, then it seems to me that the judgment mentioned in the order of reference would be relevant, because it having recognized the right of the plaintiff to the present suit, by itself and in connection with the circumstance that it was so recognized, notwithstanding the evidence adduced by the defendant, makes the existence of the fact in issue in this suit highly probable.

Again, it may be said that if we are to admit the judgment under consideration as evidence, we must also hold that a judg-

1880 ment to which the person against whom it is sought to be used
 GUJGU LALL was not a party, would also be admissible, because the sections
 P. in question make no distinction between these two classes of
 FATTEN judgments. It is true that that would be the consequence, but
 LALL. ordinarily no weight should be attached to a judgment between
 other parties. A similar objection may be urged against the
 rule of English law, by which, in matters of public interest,
 such as a claim of highway, evidence of reputation from any
 one is receivable (see s. 545 of Taylor on Evidence). For
 example, in a claim of a highway alleged to be existing in an
 obscure village in the district of Nuddea, evidence of reputation
 of an inhabitant of Benares, evidently not possessing any inform-
 ation on the subject, would be receivable. But what weight
 would be attached to his testimony? Similarly, when a judg-
 ment would be sought to be used against a person who was
 not a party to it, ordinarily no weight ought to be attached to
 it. I say ordinarily, because there might be special circum-
 stances which might give to it a weight which it otherwise
 would not have. For instance, if it be proved that a particu-
 lar person, although not formally a party to a previous pro-
 ceeding, was yet substantially represented in it, because the
 whole control of that proceeding was in his hands, it would be
 just and reasonable to allow to the previous judgment some
 weight in that case. It seems to me that the Legislature, in
 enacting these sections, have followed out the principle which
 was laid down by the Judicial Committee in the case already
 cited, *viz.*, to leave to a Court of Justice in each particular
 instance to assign the proper weight and value to a previous
 judgment that might be produced as evidence in a cause.

I would, therefore, answer the question in the affirmative.

PONTIFEX, J.—In considering the rules of evidence it is
 necessary to look to the reason of the matter. With respect to
 judgments *inter partes*, it would be unreasonable that a person
 who has proved his case once against his opponent, who had
 a full opportunity of rebutting it, should be compelled a second
 time to adduce his proofs against the same opponent. Otherwise
 there would obviously be no end to litigation.

But it is by no means unreasonable that a person who has never before been put to the trouble and expense of adducing his proofs, should be treated in the same way as if his opponent had suffered no adverse judgment in any other proceeding.

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The same opportunities of proof are open as were open to the successful litigant in the first proceeding. Why should a stranger to that proceeding be excused from furnishing evidence in the ordinary course?

In matters of public right the new party to the second proceeding, as one of the public, has been virtually a party to the former proceeding, and therefore he is properly excused.

The observations of the Privy Council, quoted by Mr. Justice Mitter, seem to me to refer more to matters of form than to matters of substance, and to apply to the manner in which a case should be treated by the final tribunal after having passed through all its stages.

But the matters we have to deal with is essentially one of substance and not of form, and in giving our judgment we shall be laying down the principle on which a case ought to be tried in its earliest stage.

The reason of the matter being, as it appears to me, against the admission in evidence of a judgment not *inter partes*, I think we ought not to give a final construction to ss. 11 and 13 of the Evidence Act, which construction would also, as pointed out in the judgment of the Chief Justice which I have had the opportunity of seeing, make ss. 40—43 surplusage.

I remain of opinion that the judgment in question in this reference is neither a “fact” within the meaning of s. 11, nor a “transaction” within the meaning of s. 13.

JACKSON, J.—In my opinion the previous judgment was not admissible as evidence in this case.

In order to a conclusion on this point, it seems to me a relevant fact that the Indian Evidence Act, 1872, was passed by the Legislature of this country under the direction of a skilled lawyer, for the express purpose of consolidating, defining, and amending the law of evidence in India; that the construction of the Act is marked by careful and methodical

1880 arrangement; and that many of the more important expressions
 GUJRU LALL, used in it are plainly interpreted.

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' It would be wholly inconsistent with the plan of such an enactment that a specific rule contained in one part of it should at the same time be contained in or deducible from one or more other rules relating apparently to topics quite distinct, which rules should be at the same time so expressed as to include not merely the specific rule in question, but also matters which that rule taken by itself would specifically exclude.

If we are to accept the argument for the respondent in this case, a judgment becomes relevant not only as a judgment, but also as a transaction, and again as a fact. If this be so, it is not very easy to see why the framers of the Act should have taken the trouble to frame the elaborate provisions which follow.

On the other hand, when in a law prepared for such a purpose, and under such circumstances, we find a group of several sections prefaced by the title " Judgments of Courts of Justice when relevant," that seems to me a good reason for thinking that, as far as the Act goes, the relevancy of any particular judgment is to be allowed or disallowed with reference to those sections.

But admitting, for the sake of argument, that the Act could have been drawn in so loose and unskilful a fashion, I proceed to consider whether the judgment in question can be admitted as a transaction or as a fact.

The kind of transaction relied on is that mentioned in s. 13, " where the question is as to the existence of any right or custom." It seems to me as clear as anything can be, that the " right " here spoken of is something quite distinct from *ownership*. How can it possibly be said, when the question between plaintiff and defendant is which of them is entitled to a thing, that the question relates to the *existence of a right*. That some one has a right to the property is undoubted. The question is, to whom it belongs. What is referred to in the section cited is evidently a right which attaches either to some property or to *status* : in short, incorporeal rights, which though transmissible, are not tangible or objects of the bodily senses. To this inter-

pretation, the object, the particular facts selected, and the illustrations to the section, all seem to me to conduce.

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But, in addition, I cannot look upon the description of a judgment of a Court of Justice as a *transaction* otherwise than as a misuse of language; nor can any of the verbs which must come in to complete the relevancy of such transaction be properly used in respect of judgments.

A *transaction*, as the derivation denotes, is something which has been concluded between persons by a cross or reciprocal action as it were, whereas the judgment of a Court is something imposed by the authority of the tribunal. But the Court neither creates, claims, modifies, recognizes, asserts, nor denies a right or custom. It determines for or against. Consequently, in every point of view from which this section can be looked at, it seems to me wholly inapplicable to the case.

But then it is said that the judgment is a fact, and a relevant fact under s. 11.

No doubt, everything which has been called into being by some agency or other, is, in the widest sense, a fact; and in a certain sense, it may be said that a judgment is a fact within the meaning of s. 3 of the Evidence Act, and facts are relevant when connected with another fact in any of the ways referred to in connection with relevancy.

Now, if we strip a judgment of the peculiar character of authority given to it by s. 40 *et seqq*, all that it amounts to is this, that *A* and *B* were before *Z*, who is a Judge on a particular day, and that *Z* formed a particular opinion on a subject as to which *A* and *B* were at issue. This, according to the argument, makes it highly probable that *X*, a different Judge, should come to the same conclusion upon a similar dispute between *A* and *C*.

That the Legislature should have intended to give that sort of efficacy to the judgments of the Courts, I should have much difficulty in believing, even if the words otherwise suggested the construction which, in my opinion, they do not.

I have had the opportunity of reading the judgment which the Chief Justice proposes to deliver, as well as the observations of my brother Pontifex, in both of which I generally

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GURJU LALL concur, and for the reasons there stated, and those which I have
shortly given, I consider the evidence inadmissible.

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GARTH, C. J.—I am of opinion that the former judgment was not admissible as evidence in this suit.

It was contended, in the first place, that it was admissible under s. 13 of the Evidence Act, as being a “transaction,” in which the right in question in the present suit was claimed and recognized.

I consider that the former judgment was not a “transaction,” and that the right claimed in this suit is not “a right” within the meaning of s. 13.

A transaction, in the ordinary sense of the word, is some business or dealing which is carried on or transacted between two or more persons. If the parties to a suit were to adjust their differences *inter se*, the adjustment would be a transaction; and by a somewhat strained use of the word, the proceedings in a suit might also be called “transactions;” but to say that the decision of a Court of Justice is a transaction, appears to me a misapplication of the term.

Then again as to the meaning of the word “right” in this section.

It is argued by the respondent’s counsel, that it means any right which can possibly be made the subject of a suit; but if this were its true meaning, the provisions of the section would necessarily apply to all suits, because the plaintiff in every suit claims a right of some kind, the existence of which forms the ground of his claim. Surely, this view is inconsistent with the first sentence of the section, because that sentence seems very plainly intended to confine its operation to a particular class of suits, *viz.*, those in which “a question as to the existence of some right or custom” is raised.

It may be difficult, perhaps, to define precisely the scope of the word “right,” but I think it was here intended to include those properties only of an incorporeal nature, which in legal phraseology are generally called “rights,” more especially, as it is used in conjunction with the word “custom.” It is certainly used in that sense in subsequent parts of the

Act (see s. 48 and sub-section 4 of s. 32), which deal with matters of public or general "right or custom;" and in s. 13 the word is probably intended to include both public or private rights of that nature. The "right of fishery" mentioned in the illustration is a right which may be either public or private, according to circumstances.

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That the expression is used in this limited sense is shown also, as it seems to me, by the words with which it is associated. The right mentioned in the section is one which can be "created, or exercised," which expressions are perfectly appropriate when speaking of an incorporeal right, but would be wholly inapplicable to the word "right" when used in its more extended sense. It would be quite correct to speak of the creation or the exercise of a right of way or of a franchise, but no lawyer would think of saying that a right to a chattel or to damages had been "created or exercised."

I consider therefore, in the first place, that the judgment in the former suit is not a "transaction" within the meaning of s. 13; and in the next place, that if it were, it does not relate to the sort of right which is intended by the section.

But then it is argued that if the former judgment was not admissible under s. 13, it was so under s. 11, as being a "fact," which, either by itself or taken in connection with other facts, makes the case set up by the defendant improbable. ✓

No doubt, the former judgment decided that the present defendant was not entitled to the right which he claims in this suit, but the question is, whether that decision can be properly considered as a fact. If it can, then all judgments or decisions of a Court of Justice, whatever may be their nature, and whoever may be the parties to them, would be equally admissible under s. 11, so long as they contained an adjudication, which is adverse to the claim of either party in a subsequent civil suit. Thus a decision by a third class Magistrate in a criminal proceeding, with reference to the possession of land or other property, would be admissible as evidence in a civil suit between third parties, who were not represented in that proceeding, provided only that the decision of the Magistrate was adverse to the claim of either party to the suit. As for instance, if the

1880 Magistrate decided that *X* was in possession of certain property,
 GUJJU LALL his decision would be admissible in a subsequent civil suit
 F. FATTER between *A* and *B*, where both claimed the same property,
 LALL. in order to show the improbability that, at the time of the
 Magistrate's decision, the property belonged either to *A* or *B*.

It is said that, in this particular case, the defendant, against whom the former judgment is sought to be used, was the plaintiff in the former suit, and had therefore ample opportunity in that suit of contradicting the evidence that was brought against him. But s. 11 makes no exception in favor of that or any other class of cases. If a previous adverse judgment is admissible in a civil suit under that section, it matters not what may have been the nature of the previous proceeding, nor who may have been the parties to it.

I consider that an adjudication or opinion expressed in a judgment, is not, properly speaking, "a fact," and certainly not a fact within the meaning of s. 11. The delivery or existence of the judgment itself may be a fact, but the decision which the judgment contains is no more a fact than an opinion expressed by any other person, who is not exercising judicial functions. Thus, if an opinion were given by the Legal Member of Council in answer to a question by the Government, or by a person skilled in any art or science with regard to some matter especially within his own province, that opinion, as it seems to me, would be quite as much a fact, and as admissible in evidence under s. 11, as the decision of a Judge upon a question which it was his duty to determine.

But, apart from these considerations, which arise out of the particular language of ss. 11 and 13, I think that, upon far higher and more substantial grounds, it is plain that the Legislature could never have intended to allow that wholesale departure from the English law upon this subject, which the respondent's contention would involve, and that they certainly never intended to effect that departure by means of ss. 11 and 13, which professedly do not relate to judgments at all.

I suppose it must be generally acknowledged, that, with some few exceptions, the Indian Evidence Act was intended to, and did in fact, consolidate the English law of evidence.

The different chapters of the Act deal *seriatim* with the relevancy and consequent admissibility of the different kinds of evidence, and upon this principle, ss. 5 to 16 deal with the admissibility of facts, whilst ss. 40 to 45 deal expressly with judgments; — and I cannot help thinking, with all deference to the opinions of those learned Judges who have expressed a contrary opinion, that if it had been really the intention of the Legislature to depart entirely from the English rule, and to make a very large class of judgments admissible here, which had never been admissible before the Act, either in England or in this country, they would have expressed their intention more plainly, by means of suitable provisions introduced into that portion of the Act which deals exclusively with judgments.

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If there is one rule of law which is better known and approved than another, as being founded upon the most manifest justice and good sense, it is this; that (except in the case of judgments *in rem* and judgments relating to matters of a public nature, which are governed by a different principle) no man ought to be bound by the decision of a Court of Justice, unless he or those under whom he claims were parties to the proceedings in which it was given.

✓ But if the construction which the respondent would put upon s. 13 is the correct one, any judgment of a competent Court, founded upon any conceivable right, would be evidence in any subsequent suit relating to the existence of the same right, although the parties to the two suits might be altogether different. And it is argued, moreover, that this radical change in the law of evidence has been brought about not by any direct enactment upon the subject of judgments, but by treating judgments as “transactions” under s. 13, and giving to the words “transaction” and “right” in that section what appears to me to be an incorrect interpretation. And with all due respect to the learned Judges who have adopted this view, I would add, that the mistake (as I consider it) into which they have fallen, has arisen, in great measure, from an erroneous supposition that, under ss. 40 to 43, the English ✓ law upon the subject of judgments has been imperfectly enacted, and that, in order to give it its full scope, it is necessary to have

1880 recourse to ss. 11 and 13. Thus it has been considred, that
 GUJJU LALL s. 40 only makes former decrees admissible when they have the
 v. effect of preventing a Court of Justice from taking cognizance
 FATTEH of a suit, that is, from dealing with a suit in its entirety, and
 LALL. that the words "holding a trial" must necessarily refer to
 criminal proceedings only.

This construction of s. 40 would, of course, confine its operation very materially. For example, in the case of a suit for three years' rent, if a former decree had decided against the claim as regards the first year's rent only, that decree would by law be a bar to the suit as regards that one year's rent. But in the view which has been taken of the section, the decree, though a bar to the second suit *pro tanto*, would not be admissible in evidence under that section; because it would not prevent the Court from taking cognizance of the whole suit, but only of a part of it.

So again, if, in answer to a suit, some ground of defence were set up, which had been decided against the defendant in a former judgment between the same parties, that judgment, although, undoubtedly, a legal bar to the defence set up, would not be admissible under s. 40; because it would not prevent the Court from taking cognizance of the suit, but only of a defence set up to it. But surely it could never have been the intention of the Legislature to confine the effect of s. 40 in this way, to let in as relevant evidence under that section one portion of a class of judgments which operate by law as estoppels, and to leave another portion of the same class of judgments which operate equally as estoppels to be admissible as "transactions" under some other section of the Act.

It is true that s. 40 might have been more clearly worded. It has, in fact, much the same defect as s. 2 of Act VIII of 1859, which was pointed out by the Privy Council in the case of *Soorjomonee Dayee v. Suddanund Mohapatter* (1). But I cannot doubt that it was intended to include all judgments which by law operate to prevent a Court, whether civil or criminal, from taking cognizance of a suit, or trying any particular issue. The words "holding a trial" are amply large

enough to admit of this construction; and it is not because in some other Act the words "holding a trial" may have been construed to refer to criminal trials only, that we ought to confine their meaning in the same way in s. 40 of the Evidence Act.

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If this view is right, it disposes, as it seems to me, of the only real difficulty suggested by the respondent; and it will be found that many of the judgments which, in the cases cited to us in argument, have been held by learned Judges to be admissible under s. 13 only, were really admissible under s. 40. Thus, in the case put by my learned brother Mr. Justice Mitter in his judgment of the *mukurrari potta*, the former judgment would, undoubtedly, be admissible under s. 40, and would have the effect of prohibiting the Court from trying the same issue a second time. So in the case of *Naranji Bhikhabhai v. Dipaumed* (1), decided by Sir Michael Westropp and Mr. Justice Melvill, I entirely agree in the conclusion arrived at by those learned Judges, because I consider that the former decrees were clearly admissible under s. 40, and were conclusive between the parties as to the existence of the plaintiff's right at the time when those decrees were passed.

✓ Section 40, in my opinion, admits as evidence all judgments *inter partes* which would operate as *res judicata* in a second suit. Section 41 admits judgments *in rem* as evidence in all subsequent suits where the existence of the right is in issue, whether between the same parties or not. And s. 43 admits all judgments not as *res judicata*, but as evidence, although they may not be between the same parties, provided they relate to matters of a public nature relevant to the enquiry.

✓ Putting this construction upon these three sections, it will be found that they do really embody the English law as to the admissibility of judgments as it existed at the time when the Indian Act was passed; and it would be strange, indeed, if having taken the pains to confine by these sections the admissibility of judgments to those cases where they would be admissible by English law, the framers of the Act had, by

(1) I. L. R., 3 Bom., 3.

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LALL, another and a previous section, disregarded the English law entirely, and had admitted as evidence all judgments, whether between the same parties or not, which related to the same subject-matter.

It is obvious that, if the construction which the respondent's counsel would put upon s. 13 is right, there would be no necessity for ss. 40, 41, and 42 at all. Those sections would then only tend to mislead, because the judgments which are made admissible under them would all be equally admissible as "transactions" under s. 13, and not only those, but an infinite variety of other judgments which had never before been admissible either in this country or in England. And it is difficult to conceive why, under s. 42, judgments though not between the same parties should be declared admissible so long as they related to matters of a public nature, if those very same judgments had already been made admissible under s. 13, whether they related to matters of a public nature or not.

But then it is said, that s. 43 expressly contemplates cases in which judgments would be admissible under other sections of the Act, which are not admissible under ss. 40, 41 or 42. This is quite true. But then I take it, that the cases so contemplated by s. 43 are those where a judgment is used not as a *res judicata*, or as evidence more or less binding upon an opponent by reason of the adjudication which it contains, (because judgments of that kind had already been dealt with under one or other of the immediately preceding sections). But the cases referred to in s. 43 are such, I conceive, as the section itself illustrates, *viz.*, when the fact of any particular judgment having been given is a matter to be proved in the case. As for instance, if *A* sued *B* for slander, in saying that he had been convicted of forgery, and *B* justified upon the ground that the alleged slander was true, the conviction of *A* for forgery would be a fact to be proved by *B* like any other fact in the case, and quite irrespective of whether *A* had been actually guilty of the forgery or not. This, I conceive, would be one of the many cases alluded to in s. 43.

Then, again, it was argued, that, in this country, the rules of evidence in the *mofussil*, especially as to the admissibility

of former decrees, were never so strict as in England; and in support of that contention several cases were cited to us decided by Mr. Justice Dwarkanath Mitter and other eminent Judges of this Court; and we were referred to certain observations made by their Lordships of the Privy Council to the same effect (1). But those cases, it must be borne in mind, occurred many years ago, at the time when the practice in the mofussil in this respect was very lax and before the Evidence Act was passed; and the observations of the Privy Council were made, as I humbly conceive, not as approving of this laxity of practice, but rather as excusing it, upon the ground that the mofussil Courts were not at that time so sufficiently acquainted with our English rules of evidence as to be able to observe them with anything like accuracy.

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I conceive that one great object of the Evidence Act was to prevent this laxity, and to introduce a more correct and uniform rule of practice than had previously prevailed; and if that Act can now be made the means, as I trust it will, of preventing the mischief which too frequently occurs, of decrees between third parties being improperly admitted as evidence in mofussil Courts, it will prove a very valuable aid to the administration of justice. I consider that the reception of loose evidence of that kind is especially dangerous in a country like this, where unhappily decrees are so often collusively obtained for no other purpose than to make them evidence in future suits between third parties.

It was argued that, instead of binding the Courts of this country by the strict rules of evidence, it would be more desirable, and was in fact the intention of the Evidence Act, to render all decrees admissible in evidence "as facts" or "transactions," leaving it to the discretion of the Courts to attribute to each judgment its due weight. But to my thinking this liberty of action would be extremely unsafe; and I certainly am not surprised to find, that the Legislature here were unwilling to leave to the subordinate Courts in this country a discretion, which it has not been thought safe or right to entrust to English Judges.

(1) See 7 Moore's I. A., at p. 137; and 9 Moore's I. A., at p. 90.

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GUJRU LALL v. FATTEN LALL. I am, therefore, of opinion that the former judgment was not admissible in the present suit: and as the majority of this Court are of that opinion, the case must go back to the Court below to be decided upon the other evidence.

The appellant will be entitled to his costs in this Court; and those of the Court below will follow the result of the suit.

MORRIS, J.—I agree with the Chief Justice in holding that the former judgment was not admissible as evidence in the present suit.

APPELLATE CIVIL.

Before Mr. Justice Pontifex and Mr. Justice McDonnell.

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June 9.

MULLICK AHMED ZUMMA, *alias* TETUR (DECREE-HOLDER) v.
MAHOMED SYED (ONE OF THE JUDGMENT-DEBTORS) *

Limitation Act (XV of 1877), sched. ii, art. 179—Execution of Joint Decree against two or more Defendants.

In a suit for possession of land brought by *A* against *B*, *C*, and *D*, a decree was passed on the 14th of April 1874 for possession and costs against *B*, *C*, and *D* jointly. This decree was afterwards reversed on an appeal by *B*, who alone claimed the property. *A* then preferred a special appeal to the High Court, and on the 29th June 1877 the decision of the Judge was reversed, and the decree of the Court of first instance restored.

On the 30th December 1878, *A* applied to the Court of first instance for execution to issue against *C* and *D* for the costs specified in the decree passed on the 14th April 1874. *C* and *D* successfully objected in the Court of first instance and the lower Appellate Court, that more than three years having elapsed since the date of the decree, the decree for costs could not be executed, the application for execution being barred by art. 179 of sched. ii of Act XV of 1877. *Held*, on appeal to the High Court, that, inasmuch as *B*'s appeal had related to the whole case, and the decree obtained by him dismissing the suit would, if not reversed, have deprived *A* of his right to any costs at all, *A*, upon succeeding in getting the original decree restored upon special appeal to the High Court, was entitled to execute such restored decree at any time within three years of the order of the High Court.

* Appeal from Appellate Order, No. 31 of 1880, against the order of G. E. Porter, Esq., Officiating Judge of Gya, dated the 14th October 1879, affirming that of the Subordinate Judge of that district, dated the 12th May 1877.

THE appellant brought a suit against Mahomed Syed, the present respondent, and two other persons, for possession of certain land; and a decree was, on the 14th April 1874, made therein against the three defendants jointly, with costs. One of them alone appealed to the Judge of Gya from that decision, claiming possession of the whole of the property. The Judge of Gya reversed the decree of the first Court; but on special appeal to the High Court preferred by the present appellant, the decision of the Judge was set aside, and the decree of the Court of first instance, of 14th April 1874, was restored.

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On the 30th December 1878, the decree-holder applied for execution of the decree of 14th April 1874, against Mahomed Syed, one of the defendants who had not appealed from that decree.

The Subordinate Judge of Gya held, that the decree of 14th April 1874 not having been appealed against by Mahomed Syed was final as between him and his decree-holder, and as the application for execution was made more than three years from the date of the decree, it was barred by lapse of time.

On appeal, the Judge of Gya upheld this decision, on the ground that "the fact that an appeal was preferred by one of the defendants will not prevent limitation running in favor of the others against the execution of the decree," in support of which he referred to the case of *Hur Proslud Roy v. Enayet Hossein* (1). From this decision the decree-holder appealed to the High Court.

Mr. *Sandel* for the appellant.

No one for the respondent.

The judgment of the Court (PONTIFEX and McDONELL, JJ.) was delivered by

PONTIFEX, J.—In this case there seems to have been a decree for possession with costs against three defendants. Inasmuch as possession was claimed by only one of the defendants, that defendant alone appealed and was successful before the Judge. But the plaintiff appealed to this Court, and obtained a decree restoring the decision of the first Court. The Judge in the

1880

MULLICK
ARMED
ZUMMA
T.
MAHOMED
SYED.

Court below has relied on the case of *Hur Proshad Roy v. Enayet Hossein* (1), in which it was held that an appeal by one defendant did not prevent time from running for the purpose of executing the decree against the non-appealing defendants.

The reason why in that case it was held that limitation would apply, was because the appeal there was on the part only of a ten-pie shareholder of the property, leaving the decree capable of execution against the remainder of the property, which could not be affected by the result of that appeal. But in the present case the appeal of the one defendant related to the whole case of the plaintiff, and he was successful in getting the suit dismissed by the lower Appellate Court, which would have deprived the plaintiff of his right to any costs at all. In special appeal the plaintiff succeeded in getting the Judge's decree reversed; and therefore the original decree for costs was restored.

We overrule the orders of the Court below, and declare the plaintiff entitled to proceed with the execution of his decree for costs against the respondent.

The appeal is allowed with costs.

Appeal allowed.

Before Mr. Justice Morris and Mr. Justice Prinsep.

1890

June 28.

KONARAM GAONBURAM (PLAINTIFF) v. DHATOARAM THAKOOR
AND ANOTHER (DEFENDANTS).*

Right of Occupancy in Assam--Act X of 1859, s. 6--Government Ryot.

A Government ryot can acquire a right of occupancy in respect of lands cultivated by him under the rent law in force in Assam.

THIS was a suit for the recovery of possession of one biga and one cotta of land situate in Assam.

The plaint alleged, *inter alia*, that a portion of the land in dispute had been held by the plaintiff's father in 1860; that

* Appeal from Appellate Decree, No. 1378 of 1879, against the decree of Colonel A. K. Comber, Deputy Commissioner and Subordinate Judge of Durrang, dated the 21st of April 1879, reversing the decree of K. N. Burroon, Esq., Munsif and Extra Assistant Commissioner of Tejpore, dated the 13th December 1878.

these lands were measured in the year 1863, and found to be in extent three cottas and six bechas; and that a potta of these lands was granted to the plaintiff's father by the Government in that year. In the year 1875, one Malai Deoree relinquished his holding, and on the application of the plaintiff, these lands were leased to him by the Government, the lands comprising his original holding and those now leased to him being incorporated in a single potta, the extent of the lands so included being the one biga and one cotta of land, the subject of the present suit. In the following year certain lands, including the lands now in dispute, were transferred as the debutter lands of the Bhoirobi Temple; and the first defendant, the presiding priest of the temple, leased the plaintiff's land to the second defendant, who thereupon ousted the plaintiff from the possession of these lands.

1880
KONARAM
GAONBURAH
v.
DHATOARAM
THAKOOR.

The defendants contended, that the lands in dispute had always been debutter lands appertaining to the temple; that the second defendant had been in possession of these lands either through himself or his ancestors for a long period.

The Court of first instance found that the lands in dispute at the time of the potta granted in 1875 was kherajee or Government rent-paying land; that in respect of three cottas and six bechas of such land, it having been held by the plaintiff for upwards of twelve years as a Government ryot, a right of occupancy had accrued to him; and that in respect of the remaining portion of such land, the plaintiff had proved his right to the possession of the same. The lower Appellate Court was of opinion that, under Act X of 1859, s. 6 (the law still in force in Assam), no right of occupancy could accrue to a ryot holding lands under the Government, and that the lands having been transferred to the Bhoirobi Temple, the plaintiff, being in the position of a mere tenant-at-will, could be legally ousted by the defendants, and thereupon set aside the judgment of the Court below.

The plaintiff appealed to the High Court.

Baboo *Doorga Mohun Dass* for the appellant.

The respondents were unrepresented.

1880

KONARAM
GAONBURAH
v.
DHATOARAM
THAKOOR.

The judgment of the Court (MORRIS and PRINSEP, JJ.), so far as is material to this report, was as follows, and was delivered by

MORRIS, J.—We are unable to assent to the proposition laid down by the lower Appellate Court in this case, that a Government ryot cannot acquire a right of occupancy in lands cultivated by him under the Rent Law in force in Assam. The law in force in Assam is, as we understand, Act X of 1859, and it is in operation without any reservation; consequently, under s. 6, a tenant contracting with the Government can certainly acquire a right of occupancy. The Government is not in the position of a proprietor holding land khamar, nijjote, or seer in the entire province. As in the other settled provinces of Bengal, it gives out the land in settlement ryotwar, and neither under the settlement, nor under the law, is the ryot prevented from acquiring, after twelve years, a right of occupancy. The case must, therefore, be remanded to the lower Court for retrial. It will be necessary, as the lower Appellate Court has not expressed any opinion on the finding of the first Court on the point, to determine whether, in respect of the two plots of land held by him, the plaintiff has a right of occupancy.

The case is, therefore, remanded, in order that the Court below may come to a finding on this question of the right of occupancy. Costs will abide the event.

Case remanded.

Before Sir Richard Garth Kt, Chief Justice, and Mr. Justice Miller.

CHOTTOO MISSER (ONE OF THE DEFENDANTS) v. JEMAH MISSER
AND OTHERS (PLAINTIFFS).*

1880

July 19.

Hindu Law—Suit to set aside Alienations by Hindu Widow—Suit to restrain Hindu Widow from committing Waste—Contingent Reversionary Interest.

Persons having a contingent reversionary interest in lands, expectant on the death of a Hindu widow, though they cannot sue for a declaration of title to the lands as against third persons, may sue as presumptive heirs to set aside

* Appeal from Appellate Decree, No. 358 of 1879, against the decree of Baboo Kaliprosuno Mookerjee, Additional Subordinate Judge of Saran, dated the 9th December 1878, reversing the decree of Baboo Birj Mohun Pershad, Munsif of Purnea, dated the 13th of March 1877.

alienations of the property made by the widow, upon the ground of there being no legal necessity for such alienations, or to restrain her from committing waste.

1880

CHOTTOO
MISSER

v.

JEMAH
MISSER.

Unless such suits could be brought, it might be impossible, if the widow lived to a great age, to bring evidence after her death to prove that there was no legal necessity for the alienations. Nor would it be possible to prevent the widow from committing irremediable mischief to the estate.

THIS was a suit for declaration of the plaintiffs' right as reversionary heirs over certain land inherited by the defendant No. 1, a Hindu widow, as heir of her deceased husband Pertab Misser; to set aside an alienation made by her of a portion of the land to the defendant No. 2, as having been made without any legal necessity; and to restrain her from committing waste of the properties in her possession.

The defendant contended, that the alienation in question was made for legal and necessary purposes. The lower Court, without going into question of necessity, dismissed the suit, on the ground that the plaintiffs, though presumptively the heirs of Pertab Misser, had no right to set aside the mortgage during the widow's lifetime, because their interest in the property was only contingent upon their surviving her. The lower Appellate Court reversed this decision, holding, that the plaintiffs could not obtain a declaration of their reversionary rights, as their interest was contingent; that there was no legal necessity for the mortgage; but that the plaintiffs were entitled to a decree declaring the mortgage invalid against them after the widow's death, in case they should survive her. From this decision the second defendant appealed to the High Court.

Baboo Hari Mohun Chuckerbutty for the appellant.

Mr. M. L. Sandel and *Mr. C. Gregory* for the respondents.

The judgment of the Court (GARTH, C. J., and MITTER, J.) was delivered by

GARTH, C. J. (who, after shortly stating the facts, continued):—
In this Court, it has been argued by the appellant, that, according to the rule laid down by the Privy Council in the

1880 *Shivagunga case (Kathama Natchiar v. Dorasinga Tever)* (1),
 CHOTTOO MISSEK
 v.
 JEMAH MISSEK.
 the plaintiffs were not entitled to the decree which the lower Court has given them; that their interest being only contingent, the Court could make no declaration of title in their favour; and that the decree which they have obtained is not one which can give them any consequential relief in this or any other suit.

It appears to me, however, that this is one of that class of cases which are referred to in the *Shivagunga case* (1) as being exceptions to the general rule, which is there laid down. In page 191 of the judgment, their Lordships allude to suits brought against Hindu widows by presumptive reversioners to restrain waste and the like, as being "suits of a very special class, which have been entertained by the Courts *ex necessitate rei*." They expressly say, that, in such cases, the reversioner cannot get a declaration of his own title as against third persons; but he is permitted to sue as the presumptive heir, because, unless he were allowed to bring such a suit, there would be no means of preventing the widow from doing perhaps irremediable mischief to the estate. And suits like the present, it seems to me, come clearly within the principle of that exception.

It was held by the Privy Council in the case of *Thakoorain Sahiba v. Mohun Lall* (2), that suits of this kind would lie "upon the ground of the necessity that the contingent reversioner may be under, of protecting his contingent interest."

Unless such a suit could be brought, it might be impossible, if the widow lived to a great age, to bring evidence after her death to prove that there was no legal necessity for alienations which she may have made when a young woman; and it is for this reason,—namely, the probability of failure of evidence through lapse of time,—that the right to bring these suits has been constantly upheld by this Court; see *Gobindmani Dasi v. Shamlal Bysak* (3), *Lalla Chuttur Narain v. Wooma Koonumree* (4), *Behary Lall Mohurwar v. Madho Lall Shir Gyawal* (5), *Kami-*

(1) L. R., 2 I. A., 169.

(3) B. L. R., Sup. Vol., 48; S. C.,

(2) 11 Moore's I. A., 386; S. C., 7 W. W. R., Sp. No., 165.

R., P. C., 25.

(4) 8 W. R., 273.

(5) 13 B. L. R., 222; S. C., 21 W. R., 430.

kha Prasad Roy v. S. M. Jagadamba Dasi (1). I think, therefore, that the lower Appellate Court was quite right, and that this appeal should be dismissed with costs.

Appeal dismissed.

1880
CHOTTOO
MISSEER
v.
JEMAH
MISSEER.

Before Mr. Justice White and Mr. Justice Field.

HURRO PERSHAD ROY CHOWDHRY (JUDGMENT-DEBTOR) v. BHUPENDRO NARAIN DUTT AND OTHERS (DECREE-HOLDERS).*

1880
June 23.

High Court, Appellate Side—Jurisdiction to execute Decrees—Civil Procedure Code (Act X of 1877), s. 649—Limitation Act (IX of 1871), sched. ii, art. 167.

Although the High Court in its Appellate Side does not, as a general rule, execute its own decrees or orders, yet this circumstance in no way affects the vitality of its jurisdiction in this respect, and it cannot therefore be included among Courts which have ceased to have jurisdiction to execute decrees as specified under s. 649 of the Code of Civil Procedure.

The period of limitation within which application must be made for execution of an order for costs passed by the High Court when rejecting a petition for leave to appeal to the Privy Council, is that specified in sched. ii, art. 167 of Act IX of 1871 (2).

Baboo *Bhubany Churn Dutt* for the appellant.

Baboo *Gooroo Dass Banerjee* for the respondents.

THE facts of this case sufficiently appear in the judgment of the Court (WHITE and FIELD, JJ.), which was delivered by

WHITE, J.—This is an appeal against an order of the Subordinate Judge of the 24-Pargannas, dated the 13th of October 1879.

It appears that the High Court, on the 4th of August 1876, upon the application of Hurro Pershad Roy Chowdhry for leave to lodge an appeal in the Privy Council, dismissed the application, and directed him to pay to the respondents before

* Appeal from Order, No. 16 of 1880, against the order of Baboo Krishna Mohun Mookerjee, Second Subordinate Judge of the 24-Pargannas, dated the 13th October 1879.

(1) 5 B. L. R., 508.

(2) Cf. Sched. ii, art. 179, Act XV of 1877.

1880 us Rs. 50 as costs. But the order was silent as to the Court
 HURRO which should compel the payment of the costs, in case Hurro
 PERSHAD Pershad would not pay them.
 ROY CHOW.
 DHEY

The respondents, when the costs were not paid, applied for the
 execution of the order to the Court of the Subordinate Judge
 of the 24-Pargannas. The suit had been originally instituted
 in that Court, but had been called up by the District Judge for
 trial in his own Court; and his was therefore the Court which
 passed the decree.

BHUPENDRO
 NARAIN
 DUTT.

Two objections were taken before the Subordinate Judge, which have been renewed before us on this appeal. The first is, that the execution of the order was barred.

We are of opinion that the lower Court has dealt properly with this objection. The period of limitation applicable to the execution of the order is three years from its date. It clearly falls under art. 167 of the Limitation Act, which prescribes the period for the execution of "an order of any Civil Court not provided for by art. 169." Article 169 relates to the execution of orders on the Original Side of the High Court, and is therefore out of the question.

The second objection is, that the Subordinate Judge had no jurisdiction to execute the order.

The Subordinate Judge considers that he has jurisdiction under s. 649 of the Code, which provides, amongst other things, that "where the Court which passed the decree has ceased to exist or to have jurisdiction to execute it," the decree may be executed by "a Court which would have jurisdiction to try the suit in which the decree was passed." The Subordinate Judge considers that that section applies to orders as well as decrees, and treats the High Court as a Court which had either ceased to exist or to have jurisdiction to execute the order.

Whether the section applies to an order like the one before us, it is not necessary to decide now, for it is clear that the High Court does not fall within the description of a Court which has either ceased to exist, or ceased to have jurisdiction to execute its own order. It is true that the High Court, on its Appellate Side, does not, as a general rule, execute its own decrees or orders, but directs them to be executed by one or other of the Mofussil

Courts subordinate to its jurisdiction. But this circumstance does not affect the vitality of its jurisdiction any more than it affects the fact of its actual existence.

The decision, therefore, of the Subordinate Judge, which proceeds on the applicability of s. 649 to the case before him, is, in our opinion, erroneous.

That being so, and there being no other section in the Code under which the order of the Subordinate Judge can be upheld, we must allow this appeal, and set aside the order with costs.

Appeal allowed.

Before Mr. Justice White and Mr. Justice Field.

HURROSOONDARY DASSEE AND ANOTHER (JUDGMENT-DEBTORS) v.
JUGOBUNDHOO DUTT AND OTHERS (DECREE-HOLDERS).*

1880
June 28.

Application for Execution of Decree—Res judicata.

An order refusing an application to execute a decree is not an adjudication within the rule of *res judicata*.

Delhi and London Bank v. Orchard (1) followed.

Baboo *Akhil Chunder Sein* and Baboo *Kashee Kant Sein* for the appellants.

Baboo *Bungshi Dhur Sein* for the respondents.

THE facts of this case sufficiently appear in the judgment of the Court (WHITE and FIELD, JJ.), which was delivered by

WHITE, J.—This was an appeal against an order of the District Judge of Dacca, dismissing an appeal which the appellants before us had preferred against an order passed by the Munsif of Moonsheegunge on the 23rd of May 1879.

On the 8th of July 1878, the appellants had procured the reversal of an order by which the Munsif had directed execution to issue for the possession of certain land under a decree

* Appeal from Appellate Order, No. 58 of 1880, against the order of R. F. Rampini, Esq., Officiating Judge of Dacca, dated the 27th November 1879, affirming the order of Baboo Jodoo Nauth Dass, Munsif of Moonsheegunge, dated the 23rd May 1879.

(1) I. L. R., 3 Calc., 47; S. C., L. R., 4 I. A., 127.

1880 obtained by the respondents. The reversal was procured on the
 HURMOON- ground that execution was barred. Inasmuch as, before the
 DARY reversal was obtained, the respondents had been put in possession
 DASSEE of the land by the first Court, it became necessary for the appel-
 v. JUGOBUN- lants to apply, and they accordingly applied on the 23rd of May
 DHOO DUTT. 1879, to be restored to possession. In consequence, however,
 of certain prior proceedings that had taken place (to which I
 shall presently refer), the Munsif simply made an order that a
 notice should be served on the opposite party,—that is, the res-
 pondents,—directing them to give up possession; which order
 the District Judge has confirmed on appeal.

The prior proceedings alluded to are these: Very shortly
 after the appellants obtained the reversal of the order for the
 execution, they, on the 6th of November 1878, made a similar
 application to the one that was made in May 1879,—namely, to
 be restored to possession of the land. The Munsif on that
 occasion, instead of making the order, merely directed, as he did
 on the 23rd May 1879, that a notice should be given calling
 upon the respondents to give up possession. His reason for
 making the order in that limited form was, that he could find
 no section in the Civil Code which directed that, when a decree
 which had been executed is reversed, restitution should be made,
 or which provided any machinery for effecting the restitution.
 The reason is altogether insufficient. There was no occasion to
 resort to any section of the Code in order that a first Court
 may give effect to the order of an Appellate Court reversing its
 own order. It has full authority, and is moreover bound, to exe-
 cute the order of the Appellate Court; and if, before the reversal,
 anything has been done under its own order, it has full authority,
 and is moreover bound, to undo what has been so done, and to
 put the parties back into precisely the same position as they
 stood in before its own order was made. No appeal was preferred
 by the appellants against the Munsif's order of the 6th of
 November 1878; but after waiting some time and not getting
 possession, they again applied to the Munsif to be put into pos-
 session. The Munsif refused that application (the ground on
 which he did so is not stated); but on that occasion the appel-
 lants did appeal to Mr. Dickens, the then Judge of Dacca.

Mr. Dickens dismissed the appeal, on the ground that it was out of time, but at the same time made some observations which the present Judge of Dacca thinks that the appellants misunderstood, and which were, that the proper course for the appellants to adopt was to apply to have effect given to the order of the 6th November 1878.

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HURROOON-
DARY DASSEN
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DHOO DUTT.

The present Judge of Dacca is of opinion that the suggestion made in Mr. Dickens's order when he dismissed the appeal, was a suggestion that the proper way of carrying out the order of the 6th November was to direct the issue and service of the notice mentioned in the order. He has accordingly, in that view of the case, dismissed the appeal, which was preferred to him against the order of the 23rd of May 1879; and he further states that, in consequence of the order of the 6th November 1878 not having been appealed against by the appellants, it must be accepted as final and binding in the matter, and that whether it is right or wrong, it is now *res judicata*.

It is not necessary to consider what Mr. Dickens meant when he made the suggestion referred to, because whatever might have been his intention, the appellants, in May 1879, made a fresh application to be put in possession of the property, which, in our opinion, ought to have been granted, unless the order of the 6th of November is properly held to have the effect of a *res judicata*. It is not clear that the several applications ought to be treated as distinct applications to be restored to possession, rather than as one continued application; but, taking them as distinct applications, they were in substance applications for the execution of the Appellate Court's decree. It has been held by the Privy Council in *Delhi and London Bank v. Orchard* (1), that the refusal of an application to execute a decree is not a bar to a second application being made for the execution of the same decree. The precise ground upon which, their Lordships' decision proceeded is not stated. Possibly, it may have been that the refusal of the application was not to be considered as an adjudication on the point. But whatever their reasons may be, the case that I have cited is a clear authority, that the application which the appellants made on the 23rd May 1879 is

(1) I. L. R., 3 Cal., 47; S. C., I. R., 4 I. A., 127.

1880
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DHOO DUTT.

not barred by the refusal either of their application on the 6th of November 1878, or of their intermediate applications between that date and the 23rd of May.

We have been referred to a case (appeal from Appellate Order, No. 169 of 1878), in which my brother Mitter and myself held, that a question decided in the course of prior execution proceedings was deemed *res judicata*, and could not be raised again in subsequent proceedings. But that was a very different case from the present. There the question was as to the construction of a decree; it was raised by the judgment-debtor a second time after it had on a previous application for execution been decided in favor of the judgment-creditor, and after the judgment-debtor had preferred an appeal against the decision, but had not thought fit to prosecute it.

The orders of both the lower Courts must be set aside, and we make the following order, that the appellants be restored to the possession of the property of which the respondents were put in possession under the order for execution, which has been reversed.

Appeal allowed.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

1880
May 20.

KOYLASH CHUNDER KOOSARI AND ANOTHER (TWO OF THE DEFENDANTS) v. RAM LALL NAG (PLAINTIFF).*

Appeal from Appellate Decrees — Appellant dissatisfied with Findings in Judgment—Civil Procedure Code (Act X of 1877), ss. 540 and 584.

An appellant, who has obtained a decree setting aside the decision of the Court of first instance, is not entitled to a further appeal to the High Court, on the ground that he is dissatisfied with some of the findings recorded in the judgment of the lower Appellate Court, an appeal from an appellate decree under s. 584 being strictly restricted to matters contained in the decree alone.

In this suit the material facts are as follows:—One Prosonno Chunder Chowdhry, together with other co-sharers in an estate,

* Appeal from Appellate Decrees, Nos. 1776 and 1777 of 1879, against the decree of A. C. Brett, Esq., Judge of Jessore, dated the 25th June 1879, reversing the decree of Baboo Monmothomath Chatterjee, First Munsif of Bageerhat, dated the 16th December 1878.

created a sub-taluk in favor of Bishto Dutt and Kamal Dutt, who, in turn, created further sub-tenancies in favor of certain parties represented by the intervenors in the present suit. Prosonno Chunder Chowdhry brought on his own behalf a suit against the sub-talukdars Bishto Dutt and Kamal Dutt for rent, and having obtained a decree, sold the right, title, and interest of the judgment-debtors in the sub-taluk. The plaintiff, the purchaser at that sale, instituted the present suit for the recovery of rent from the ryot-defendants holding lands within the said sub-taluk, contending that such rent was directly payable to the plaintiff, he being a purchaser who obtained his land free of incumbrances. The holders of the various under-tenancies in the taluk intervened in this suit, on the ground that the plaintiff's purchase did not pass the land free of incumbrances, and that such intervenors were entitled to receive the rent from the ryot-defendants. They also raised the further question, whether the plaintiff, as a fractional shareholder, was entitled to bring a separate suit for his share of the rent.

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The Court of first instance was of opinion that the intervenor-defendants were estopped from raising these contentions by a decree in a previous suit brought by the plaintiff for the recovery of rent from a ryot occupying lands in the same taluk; and in which suit some of the present intervenor-defendants had similarly intervened, and thereupon gave the plaintiff a decree.

The lower Appellate Court coincided in opinion with the Court of first instance, that the previous decree was a *res judicata* in respect of the contention that the purchase of the plaintiff was one free from incumbrances; but that such previous decree did not touch the second contention raised by the defendants. On this point the Court found that the plaintiff, as a fractional shareholder, was not entitled to bring a separate suit for the recovery of his share of the rent, and reversed the judgment of the Court below. The decree embodying this decision of the lower Appellate Court simply stated that the order of the lower Court had been set aside, and the appeal affirmed with costs.

The intervenor-defendants, being dissatisfied with the reason upon which the lower Appellate Court had reversed the deci-

1880

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sion of the Court below, appealed to the High Court, on the ground that the lower Appellate Court had erred in finding that the plea of *res judicata* raised by the plaintiff was, for the reasons stated, a valid objection to the suit.

Baboo Mohiny Mohun Roy and *Baboo Rash Behari Ghose* for the appellants.

Baboo Sreenath Dass and *Baboo Troylokonath Mitter* for the respondent.

The judgment of the Court (JACKSON and TOTTENHAM, JJ.) was delivered by

JACKSON, J. — In this case, after the questions raised in appeal had been fully argued by *Baboo Mohiny Mohun Roy*, it was brought to our notice by *Baboo Sreenath Dass*, on the part of the respondent, that in this case the defendants before us are not entitled to appeal, inasmuch as, under s. 584, as under s. 540, of the Code of Civil Procedure, an appeal lies only as against the decrees of the subordinate Courts. The words in s. 540 are, "from the decrees or from any part of the decrees," and the last mentioned expression is not to be found in s. 584. The contention of the respondent's *vakil* is, that the defendants in these cases, who have obtained the benefit of the decree of the Court below, by which the suits are dismissed, are not entitled to come up here in appeal by reason of a particular expression or finding contained in the judgment, against which the Code does not allow an appeal. It appears to us that, in regard to s. 584, that undoubtedly is so. It no doubt frequently happens that, in cases before the Court of first instance, the defendant is enabled to set up various pleas, and by succeeding on one or other of those pleas he may defeat the plaintiff: as for instance in a suit for rent at an enhanced rate, the plaintiff may, after contest, succeed in showing that the defendant's tenure is liable to enhancement, but he may fail to prove either that he served sufficient notice, or that the particular rent was claimable, or for some other cause the suit may ultimately fail. In such a case it appears to me that the plaintiff ought to take care that the decree sets out a declaration of the Court as to

that part of the case on which he succeeds, because, when that is done, the defendant has an opportunity, under s. 540, to appeal against that part of the decree which is prejudicial to his interest. Where that has not been done, where the decree of the Court is simply one dismissing the suit, there I apprehend the defendant is not entitled to appeal; but of course the question will afterwards arise whether the plaintiff, where the decree is in such terms, is entitled to the benefit of any expression favorable to him which may occur in the judgment upon which the decree is founded. This of course will be a question which may hereafter be of great importance with reference to the terms of s. 13, expl. ii (1). We express no opinion on that point at present. We dismiss this appeal, but, under the circumstances, without costs.

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NAG.

Appeals dismissed.

Before Mr. Justice Jackson and Mr. Justice Tottenham.

UGGRAKANT CHOWDHURY AND OTHERS (PLAINTIFFS) v. HURRO
CHUNDER SHICKDAR AND OTHERS (DEFENDANTS).*

1880
April 29.

*Evidence—Documents upwards of Thirty years old—Proof of—Evidence
Act (I of 1872), s. 90.*

A Court is not bound to accept as genuine the signature on a document upwards of thirty years old, even though it be produced from proper custody. Before accepting such document as proof of title, the Court must satisfy itself that the person who purports to have affixed his signature to the document was a person who at the time was entitled to grant such a document.

THIS was a suit for the recovery of possession of certain lands and for setting aside an alleged miras ijara potta set up by the defendants. The defendants did not question the plaintiffs' taluqdari right; they, however, contended that they had for some considerable time been holding the lands in dispute as part and parcel of lands granted them by the plaintiffs under a miras potta, dated the 25th October 1774.

* Appeal from Appellate Decree, No. 2486 of 1879, against the decree of J. R. Hallett, Esq., Judge of Furreedpore, dated the 29th July 1879, affirming the decree of Baboo Mohima Ghose, Munsif of Madaripore, dated the 20th November 1876.

(1) See *Niamul Khan v. Phudu Bulduu*, *post*, p. 319.

1880

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CHUNDER
SHICKDAH.

Both the lower Courts gave decrees dismissing the suit.

On appeal to the High Court the case was remanded to the lower Court, the learned Judges (JACKSON and McDONELL, JJ.) being of opinion that, under the circumstances of the case, it lay upon the defendants in the first instance to prove the miras tenure set up by them, or a possession of the disputed lands adverse to that of the plaintiffs for upwards of twelve years.

On remand the defendants produced certain documentary evidence in support of their case, viz., the miras potta and certain receipts for rent alleged to have been received from the plaintiffs' ancestors by the defendants' ancestors as miras-dars, and the Court was of opinion that these documents, being professedly more than thirty years old, and therefore not requiring any attestation, were receivable in evidence, and on such documentary evidence found that the defendants had established their claim.

The plaintiffs appealed to the High Court.

Baboo *Doorga Mohun Das* for the appellants.

Baboo *Srinath Das* and Baboo *Gyanendro Nath Das* for the respondents.

The judgment of the Court (JACKSON and TOTTENHAM, JJ.) was delivered by

JACKSON, J.—We find ourselves obliged very reluctantly to order a second remand in this case. The order with which the case was sent back to the lower Appellate Court in January 1879 was sufficiently precise. The Judge, on the case going back, appears to have done that which was perhaps not absolutely open to him, viz., to admit fresh evidence, and the plaintiffs contend that, owing to the manner in which that was done, they were put at a certain disadvantage. However that may be, the Judge, we find, refused credit to the witnesses whom the defendants called to prove that the plaintiffs had knowledge of their claim to the miras tenure, and he relies altogether upon certain documents which the defendants have put in. He says:—"It remains to be seen what the documentary evidence shows. The potta certainly does not show by itself that the

plaintiffs knew for more than twelve years of the title set up by defendants. There is nothing to show that it came to their notice before 1866, which is only ten years before the institution of the present suit in the Munsif's Court. As to its genuineness, I see no reason to doubt that." Now a potta which is an instrument purporting to confer on the defendants an absolute right to hold land for ever at a fixed rate is a very important instrument, and a Judge does not discharge himself of his duty in regard to that when he simply looks at it and says he sees no reason to doubt the instrument. This is a matter of which the proof lay wholly upon the defendants, and they had to satisfy the Court that this was a genuine valid instrument. The provision of the Evidence Act which relates to documents of thirty years of age is one which requires great care in its application, especially in this country. It would be very serious indeed for persons owning land if the mere production of an instrument purporting to be thirty years old absolutely entitles the person producing it to a decision that it is a genuine valid instrument. All that s. 90 says is:—"Where any document purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court *may* presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting;" that is to say, if in this case the Court was satisfied as to the production of this instrument from what it considered to be proper custody, it would not be *bound* to presume that the signature attached to it was in the handwriting of the person whose handwriting it purported to be; and still, much would be left before the defendants would be entitled to the benefit of that instrument as establishing their title. They would have to show that the person whose handwriting the signature was, was a person entitled to grant such a document. And in like manner, as to the dakhillas, the Judge says: "I see no reason to doubt the genuineness of those upwards of thirty years old, of which no attestation is required." Here again, the utmost that the Court would be entitled to presume, and that it could only do with considerable caution, is, that

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they were signed by the person whose signature they purported to bear. It would still remain to be shown that the person signing was authorized to sign, and that his signature bound the plaintiffs. In these circumstances the Judge says:—
“The plaintiffs producing no evidence at all, I consider that the potta is genuine, and that the receipts admitted are genuine, and I consider that between them they prove both the validity of the claim set up by defendants, and the plaintiffs’ knowledge of it for more than twelve years prior to suit.” This, as I have already said, was a case in which the burden of proof as regards this issue lay upon the defendants. They were bound to prove the case. The lower Appellate Court had not sufficient materials before it for coming to the conclusion either that the potta was genuine, or that the receipts, if genuine, were binding on the plaintiffs. It is said no doubt that this potta had been already put in evidence in a previous suit between the parties in the year 1866, and the respondents rely upon the result of that suit as being a decision in their favor that they had a valid miras tenure. It appears to us that the decision is far from going that length. The potta put in by the defendants was in answer to a suit by the plaintiffs claiming enhanced rent, and the result of the suit was that the plaintiffs failed to obtain the enhanced rent; but, although the respondents’ pleader read to us such parts of the decision as he thought fit, we find nothing in it like a decision, still less a conclusive decision, between the parties that the plaintiffs had a valid miras. Under these circumstances, we think the case must go back. Of course it may be that the defendants may fail to make out a valid miras tenure, and yet the plaintiffs may not be entitled to a decree, because the defendants may be holding this land under such a tenure that they are not liable to be ousted, possibly at all, at any rate without sufficient notice. These points will have to be considered by the Court when it disposes of the question of miras. No application being made before us for leave to admit fresh evidence, the case must be disposed of on the evidence as it stands. The costs of this appeal will abide the result.

Case remanded.

PRIVY COUNCIL.

GANESH LAL TEWARI (REPRESENTATIVE OF THE DECREE-HOLDERS) v.
 SHAMNARAIN AND OTHERS (REPRESENTATIVES OF THE JUDGMENT-
 DEBTORS).*

P. C.*
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[On Appeal from the High Court of Judicature at Fort William in Bengal.]

*Civil Procedure Code (Act VIII of 1859), s. 259—Certificate of Sale—
 Mesne Profits.*

The possession, with mesne profits, of land comprised in a zur-i-peshgi lease of the year 1851, was decreed to the zur-i-peshgidars in 1860; and litigation as to their rights under the lease was carried on till 1874, when, after their deaths, it ended in favor of their representatives. In 1869, one of the parties to that litigation obtained a decree for money against the zur-i-peshgidars; and in 1874, in execution of this decree, all the right, title, and interest of the representatives of the latter, in the lease of 1851, was sold to a third party.

Held (reversing the decision of the High Court), that the right to the mesne profits awarded by the decree of 1860 did not pass by the sale, but remained in the representatives.

APPEAL from a decree of the High Court of Bengal, 24th August 1876, affirming a decree of the Subordinate Judge of the Sarun District, 1st March 1876.

In December 1851, Perhlad Sen, Raja of Ramnagar, to secure Rs. 49,453, executed a zur-i-peshgi lease of certain mouzas, including Kukurha, to Maddan Mohan Tewari and Kalipershad Tewari, whom the present appellant represented. The decisions against which this appeal was presented disposed of the petition of the present appellant, dated 18th June 1875, to execute, so far as related to wasilat, or mesne profits, a decree obtained by the lessees abovenamed on the 2nd of June 1860 upon the zur-i-peshgi lease "for possession of Mouza Kukurha, together with mesne profits, principal with interest, from the Fasli year 1262 (1855) to the date of delivery of possession." On objections filed by the present respondents, the question was raised, whether mesne profits were still claimable by the appellant, a sale having taken place in 1874, in execu-

* *Present*:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

1880 tion of a decree of 1869, against the zur-i-peshgidars, the lessees
GANESH LAL abovenamed, comprising whatever right, title, and interest the
TEWARI then judgment-debtors had in the zur-i-peshgi lease.

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The facts out of which this question arose are stated in their Lordships' judgment.

The Subordinate Judge of the Sarun District, on the 1st March 1876, allowed the objection, because, as he stated, "their right as zur-i-peshgidars had passed from the decree-holders." This judgment was confirmed on appeal to the High Court on the 24th August 1876.

The representative of the zur-i-peshgidars appealed to the Privy Council.

Mr. *R. V. Doyne* for the appellant.

Mr. *C. W. Arathoon* for the respondents.

For the appellant it was argued that his right to recover mesne profits up to the date of the sale was distinct from a right to recover possession of the mouza, which also was the subject of the decree of 1860. The certificate of sale showed that this distinction existed. The right to recover mesne profits withheld by those against whom the decree of 1860 was made, did not pass to a purchaser under words transferring only the right under the zur-i-peshgi lease.

For the respondents it was maintained that there having been an execution-sale of all the right, title, and interest of the appellant in 1874, no interest was left for him to take in execution of the decree of 1860.

At the conclusion of the arguments their Lordships' judgment was delivered by

SIR M. E. SMITH.—This was an application by Ganesh Lal Tewari, the appellant, as the representative of Maddan Mohan Tewari and Kalipershad Tewari, who had obtained a decree against the respondents, to execute that decree so far as relates to the recovery of the mesne profits of a mouza called Kukurha awarded by it. The judgment is dated the 2nd of June 1860, and was the result of an action which had been brought

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by the Tewaris against the predecessors of the respondents. The facts are shortly these: Perhlad Sen, who was the Raja of Ramnagar, executed, on the 23rd December 1851, a zur-i-peshgi mortgage to the Tewaris of certain mouzas, including Mouza Kukurha, for a sum of Rs. 49,453. Shortly after the mortgage, one Binda Lall, the predecessor of the respondents, set up a mokurari lease of Mouza Kurkurha, which, as he affirmed, had been granted to him by the Raja prior to the zur-i-peshgi mortgage. The suit was brought by the Tewaris to set aside that mokurari, on the ground that it was colourable and put forward by Binda Lall in collusion with the Raja to defeat the zur-i-peshgi, so far as related to Mouza Kukurha. The judgment of the 2nd June 1860, the execution of which is in question, states that the claim was for the recovery of "the entire 16 annas of Mouza Kukurha, the property let out in zur-i-peshgi lease, on the basis of a zur-i-peshgi lease dated 23rd December 1851." The decree was, that the plaintiffs do recover possession of the entire 16 annas of the mouza, and that the mokurari potta be set aside. Then there is this award with reference to mesne profits: "That the amount of mesne profits from 1262 Fasli to the date of recovery of possession, with interest on the principal amount of each year from the following year up to date of realisation, be awarded to the plaintiffs from the defendant Binda Lall." This was the decree of the Principal Sudder Amin. There was an appeal from it to the High Court, and ultimately an appeal from the High Court to this country; and those appeals went on concurrently with another litigation which was initiated by the Raja to set aside the zur-i-peshgi lease altogether, on the ground that it had been improperly obtained; and in this litigation also there was a series of appeals, ending in an appeal heard before this Committee—*Kaleepersad Tewari v. Lalla Binda Lal* (1). In the result the Raja failed in his suit; and the Tewaris succeeded in theirs, maintaining the decree of the 2nd June 1860, on which the present execution-proceedings are founded.

Prior, however, to any proceedings taken to execute this

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decree, the Raja obtained a judgment for some debt against the Tewaris, and in the suit in which he obtained that judgment, he, by the usual proceedings, attached and sold their interest in the zur-i-peshgi lease. The purchaser under that sale was his own Rani, and it is said that she purchased benami for him. However that may be, no question now arises as to the validity of that purchase. It must be taken that the Rani purchased what she professed to have purchased under that decree. The single question in the case is, whether the mesne profits awarded by the decree of the 2nd June 1860 passed by that sale.

We have nothing on this record but the certificate of sale. The preliminary proceedings do not appear. The certificate of sale is as follows: "And a petition being put in for the sale of his estate, a sale notification was issued pursuant to an order of this Court, and the estate aforesaid publicly sold at auction on the 7th December 1874 A.D. Whatever title, right, and concern the judgment-debtor had in the said estate have been purchased by Mussamat Maharani Bind Basini Debi, inhabitant and proprietor of Rannagar, Parganna Majhwa, for Rs. 15,500, and she has deposited the entire consideration-money. Therefore this certificate is granted to Maharani Bind Basini Debi, the auction-purchaser of the estate aforesaid; and it is hereby proclaimed that whatever title, right, and concern the said judgment-debtor had in the estate aforesaid have become extinct from the 7th December 1874, the date of sale, and vested in Maharani Bind Basini Debi, the auction-purchaser. Hereafter this certificate will be considered as a valid deed in respect of transfer of the right, title, and interest of the judgment-debtor." Then there is this description of what is sold: "The right and title under the original deed of zur-i-peshgi lease, dated the 23rd December 1851, for Rs. 42,453 in respect of 15 mouzas,"—naming them, and including Kukurha. It may be observed that the purchase-money is only Rs. 15,500 (fifteen thousand five hundred) and the zur-i-peshgi was given to secure a sum of Rs. 42,453. Upon the application made by the appellant for the execution of the decree of 1860, so far as it awarded mesne profits, the respondents, who represent the judgment-

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debtor, Binda Lall, set up this sale as an answer, contending that the right to the mesne profits had passed by virtue of it to the Rani, the auction-purchaser. But the decree which had been obtained by the Tewaris was not sold, and presumably was not attached; what was sold is that which appears on the certificate, namely, the right and title under the deed of zur-i-peshgi, and the right of the judgment-debtor is declared to have become extinct only from the 7th December 1874. This being all that was sold, their Lordships think that the right to the mesne profits under the decree was not the subject of sale. It was no more the subject of sale than any profits of the estate which the mortgagee had received prior to that sale would have been. The title to the mesne profits is derived from the decree. The defendants in that suit were wrong-doers, and the action was brought by the mortgagee against them as wrong-doers. The right to the mesne profits, therefore, depends wholly upon the decree; and if the decree had been sold, the purchaser, as assignee of the decree, would, no doubt, have been entitled to them. The High Court have based their judgment on the erroneous assumption that the rights under the decree were sold. Their Lordships think that is not the effect of the sale. The High Court refers to the judgment of the Subordinate Judge. The Judges say: "The Subordinate Judge has held that the decree cannot be executed, and that all the rights of the judgment-creditor in that decree have been transferred to the purchaser of the zur-i-peshgi rights, including the right to execute the decree obtained originally by the appellant before us." Then their own judgment is: "We also think with him, that the whole of the rights of the decree-holder (appellant before us) under the decree which he obtained have passed, with the zur-i-peshgi rights on which the decree was based, to the purchaser of those rights." Their Lordships think that this is an erroneous view of the sale. If it had been meant to attach and sell the decree, that might have been done. What was done was to sell the existing rights of the judgment-debtors under the zur-i-peshgi.

For these reasons their Lordships think the judgments of both the Courts below are wrong. They will, therefore, humbly advise Her Majesty to reverse them, and to remit the case with

1880 a declaration that the appellant is entitled to execute the decrees
 GANESH LAL of the 2nd June 1860 for the mesne profits up to the 7th Decem-
 TEWARI ber 1874, the date of the sale to the Maharani, with interest, and
 v. is also entitled to the costs of the proceedings in both the Courts
 SHAM- in India. The appellant will also have the costs of this appeal.
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Appeal allowed.

Solicitors for the appellant : Messrs. *Wrentmore and Swinhoe.*

Solicitor for the respondents : Mr. *T. L. Wilson.*

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DRIG BIJAI SING (DEFENDANT) v. GOPAL DAT PANDAY
 (PLAINTIFF).

[On Appeal from the Court of the Commissioner of Fyzabad, Oudh.]

Under-proprietary Right in Oudh—Settlement Circular Order, 29th January 1861—Oudh Sub-Settlement Act (XXVI of 1866)—Birt Sankalp and Khushust Sankalp (1)—Limitation.

A provision in the Chief Commissioner's Circular Order of 29th January 1861 in effect declares, that, to found a claim to a birt tenure in Oudh, possession must be shown to have existed in 1855, the year before annexation. This was assumed, for the purposes of this decision, to have had the force of law at the time when the Financial Commissioner ruled, in Circular Orders 5 and 6 of 5th June 1868, that "a claimant who cannot prove possession of his sankalp holding in 1262-63 Fasli (1854-55) has no *locus standi* in Court." Whether rightly treated by the Oudh Courts as an enactment of limitation, or rather to be considered as a disability affecting title, this provision was repealed by the effect of Acts XVI of 1865, s. 5, and XIII of 1866, s. 1; the suit of a birtiah becoming thereupon cognizable, notwithstanding that he might not have been in possession in 1855.

* *Present*:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. F. SMITH, and SIR R. P. COLLIER.

(1) *Birt* means a grant or endowment to any person for his maintenance or for religious and charitable objects. It also signifies proprietary right, whether acquired by purchase, inheritance, or grant, heritable and transferable, subject to payment of revenue either to Government or to the Raja or zemindar, when not specially exempt. *Sankalpa* means a tenure held under a grant or bequest. *Sankalp birt* is a religious grant to a Brahmin, and held at first rent-free, but latterly subject to a small payment. *Khushust sankalp* means a sankalp held as a favor, not as of right. —Wilson's Glossary. *Rep. note.*

The words of limitation in the Circular Order apply to all birt tenures, including those that are termed sankalp, when the latter are in the nature of birts.

Rules I and II in the schedule of the Oudh Sub-Settlement Act, XXVI of 1866, held not to exclude the plaintiff, he having shown that he, and those through whom he claimed, did not, in the words of those rules, hold the land "through privilege, or by favor of 'the talukdar,' but held by an under-proprietary right, under contract 'pucka,' with some degree of continuousness, since the village came into the taluka."

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APPEAL from the order of the Commissioner of the Fyzabad Division, 18th March 1874, affirming the decree of the Assistant Commissioner of Gonda, 21st December 1875, certified for appeal by the order of the Judicial Commissioner of Oudh, 19th August 1875.

The plaintiff sued in 1870 in the Court of the Settlement Officer of Gonda, during the progress of a regular settlement, to establish his claim to the under-proprietary right in villages forming an ilaqua of the Bulrampur estates, as his birt zemindari, granted by the defendant's ancestors to his predecessors (as he alleged), and held by them and him down to the year 1258 Fasli (1850-51), when he was forcibly ejected.

The defence was, that the plaintiff's family had been no more than tikadars or lessees. The Settlement Officer, making an exception as to two villages, called Datrangawa and Parsa, and half of a third village, called Lakhawa, part of this appellant's taluqa of Bulrampur, which he reserved for a separate investigation, finding that they were "sankalp," dismissed the claim as to the rest of the ilaqua. Afterwards the question as to these two villages and-a-half was disposed of, and the claim to them was dismissed, on the ground that the plaintiff admitted dispossession in the year 1258 Fasli (1851-52). The Settlement Officer, referring to the Financial Commissioner's Rulings V and VI, dated 5th June 1868, held, that "the settlement ruling lays down as a *sine qua non* that in claims to birt and sankalp the claimant must prove possession in 1262-63 Fasli (1854-55)."

On appeal to the Commissioner of Fyzabad this decision was reversed, the Commissioner holding that, since the passing of Act XXXII of 1871 (the Oudh Civil Courts Act), such

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On this remand a decree was made in favor of the plaintiff that he was entitled to the under-proprietary right in the two and-a-half villages as "sankalp," on payment of the Government demand, together with a malikana of ten per cent. to the Raja.

This was upheld by the Commissioner, who was of opinion that the plaintiff had proved a sankalp "intermediate title."

The Judicial Commissioner, on the application of the defendant, granted a certificate permitting an appeal to Her Majesty in Council, observing as follows:—"A distinction has always been made between birts purchased and birts granted by favor without valuable consideration. The Financial Commissioner's Rulings V and VI of 5th June 1868 apply to both sankalp and birt by favor, and they are ordered to be similarly dealt with." He then quoted Ruling V, which is set forth in their Lordships' judgment, adding that it seemed that the rulings were in no way affected by Act XXXII of 1871, "The Oudh Civil Courts Act, 1871."

Mr. *Doyne* and Mr. *J. H. W. Arathoon* for the appellant.

The respondent did not appear.

It was pointed out that Act XVI of 1865, s. 5, with which was to be read Act XIII of 1866, repealed the rules of limitation relating to under-tenures previously in force. But it was contended that the question was not one merely of the limitation of a class of suits, but one of title. The rules in the schedule of Act XXVI of 1866, "The Oudh Sub-Settlement Act," were referred to.

Their Lordships' judgment was delivered by

SIR R. P. COLLIER.—In this case the plaintiff made a claim to a settlement in virtue of his under-proprietary right, which he describes as that of a "birt zemindar," in twenty-eight villages; but that claim has now been reduced to a claim in respect of two villages and half of a third. It was at first dismissed by the Settlement Officer, on the

ground that, inasmuch as the plaintiff did not prove that he had been in possession in 1262 and 1263 Fasli—in other words, in the year 1855, the year before the annexation of Oudh—his claim could not be entertained. The Commissioner of Oudh not being satisfied with the decision on this ground, remanded the case; and upon remand, first the Settlement Officer, and secondly the Commissioner, found that the plaintiff was entitled to the right he claimed, which is sometimes described as a “birt sankalp” right, sometimes as a “sankalp” right (some kinds of sankalp being almost identical with that of birt, some being different from it), and an under-settlement was decreed to him. The Judicial Commissioner, in pursuance of a power which he possessed, allowed an appeal to this Board upon a point of law which he states to be, whether para. 5 of Ruling V of the Financial Commissioner, which he sets out, was or was not correct. The ruling is in these terms: “In the investigation of this and all cases of the same nature it must be remembered that the extension of the term of limitation made by Act XVI of 1865 is founded only on the agreement of the talukdars, and does not apply to tenures originating in favor. A claimant who cannot prove possession of his sankalp holding in 1262-63 Fasli, has no *locus standi* in Court.” This ruling appears to be based upon a circular of 1861, which their Lordships will assume to have had at the time the force of law. The passages in that circular on which the ruling is supposed to be founded are principally these: The first section enacts, “Though the settlement recently concluded with the talukdars has been declared final and perpetual, subject only to revision of assessment, it has at the same time been provided that the rights of the under-proprietors, or parties holding intermediate interest in the land between the talukdar and the ryot, shall be maintained, as these rights existed in 1855.” Then follows s. 24, which relates to birt tenures, and is in these terms: “Where the birtiah has lost possession, there is no more to be said. We are not to restore it to him. But the Chief Commissioner is clearly of opinion that the birtiahs who are found in direct engagement with the State at annexation, or who have

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uninterruptedly held whole villages on the terms of their pottas under the talukdars, must be maintained in the full enjoyment of their rights in subordination to the talukdars." Then come other sections which illustrate the meaning of birt. Section 25 says: "The meaning of the term 'birt' is a 'cession.' It was the purchase of the proprietary rights subordinate to the talukdar on certain conditions as to payment of rent, which were held to be binding, though undoubtedly often violated by superior power." Section 26 runs thus: "Instructions are also required regarding the treatment of sankalp at settlement. Some sankalp is of much the same nature as birt, and therefore will be governed by the same rules; but it differs so far from 'bai-birt' that it is a condition of the former tenure that the talukdar can redeem it at any time by repaying the purchase-money. The option of availing himself of this condition should be afforded him at settlement. Other 'Sankalp,' that which is styled 'kushust,' and is usually given to Brahmins and Pundits, is a pure maafi tenure given by the talukdar, and will be treated like other rent-free grants by talukdars." The latter words refer us back to s. 20, which is in these terms: "Those birts conferred by favor, or 'regatte' birts, as they are styled, in contra-distinction to the former, or 'bai-birts,' are not birts in their essential characteristics, but are identical with the rent-free grants made by talukdars, and therefore liable to resumption by them at regular settlement, when the Government will take its full share of the rental, as has already been explained in para. 14 of the maafi rules."

Their Lordships observe that the ruling referred to by the Judicial Commissioner draws a distinction in reference to the application of the term of limitation (as it is called) to birt tenures and to tenures in the nature of sankalp, which are to some extent different from birt tenures, and are assumed to be held at the option of the talukdar; but their Lordships find no such distinction in the circular of 1861. The words treated as words of limitation in s. 24 apply to all birt tenures. If a sankalp be a birt tenure, they apply to it; if it be not a birt tenure, they do not apply to it, and it follows

that there is no term of limitation in the circular order applicable to sankalps. But it must be assumed for the present purpose that this is a sankalp to which the term of limitation, as it is called, applies; that is to say, that it is a sankalp of the nature of a birt, which seems to be the effect of all the holdings in this case.

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Sections 1 and 24 enact in effect that if a birtiah is out of possession in the year 1855, his claim cannot be recognized. They are not, in the technical sense, enactments of limitation, though their effect is in some respects the same, viz., to prevent the owner of a birt tenure being heard to support his claim; and they appear to be treated as enactments of limitation by the authorities in Oudh, and to some extent by the Legislature itself. We then come to a statute, No. XVI of 1865, which is intitled "An Act to remove doubts as to the jurisdiction of the Revenue Courts in the Province of Oudh." Section 5 is in these terms: "No suit relating to any under-tenure which shall be cognisable in any Revenue Court under this Act"—and claims of this kind come under that category—"shall be debarred from a hearing under the rules relating to the limitation of suits in force in the Province of Oudh, if the cause of action shall have arisen on or after the 13th day of February 1844," that is, twelve years before the annexation of Oudh, which occurred on the 13th February 1856. Act XIII of 1866 followed, which is very much *in pari materia*. The 1st section, after re-enacting in almost the same words the provisions of the 5th section of the former Act, goes on to say: "And any suit or appeal relating to any tenure, and cognisable as aforesaid, which may have been rejected or dismissed upon the ground that the suit was barred under the said rules, may be revived and heard on the merits if the cause of suit shall have arisen on or after such day," that day being the 13th February 1844. It appears to their Lordships that, whether the provision in the Chief Commissioner's circular order referred to be considered a provision of limitation or not, it was in effect repealed by these statutes, and that the suit of a birtiah became cognisable, notwithstanding that he may not have been in possession in 1855. Therefore, as far as any objection could

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be raised on the question of limitation, their Lordships are of opinion that these two statutes are an answer to it.

But it has been contended that the disability which it is said the plaintiff labors under to prove his title, is not in effect a disability under a Statute of Limitations, but a disability affecting the title itself. Act No. XXVI of 1866 is relied upon for this purpose. It is entitled "An Act to legalise the rules made by the Chief Commissioner of Oudh for the better determination of certain claims of subordinate proprietors in that Province;" and it enacts, "Whereas certain rules have been made by the Chief Commissioner of Oudh for the better determination of certain claims by persons possessed of subordinate rights of property in the territories subject to his administration; and whereas it is expedient that such rules shall have the force of law, it is hereby enacted as follows:—

1.—The rules for determining the conditions to which persons possessed of subordinate rights of property to taluqas in the territories subject to the administration of the Chief Commissioner of Oudh shall be entitled to obtain a sub-settlement of lands, villages, or subdivisions thereof which they held under talukdars on or before the 13th day of February 1856, and for determining the amounts payable to the talukdars by such subordinate proprietors, which rules were made by the said Chief Commissioner, sanctioned by the Governor-General of India in Council, and published in the *Gazette of India* for September 1st, 1866, and which are republished in the schedule to this Act, are hereby declared to have the force of law."

It has been contended that the rules which have the force of law under this schedule bar the plaintiff's claim. The chief reliance has been placed upon ss. 1 and 2. The first section is to the effect that—"The extension of the term of limitation for the hearing of claims to under-proprietary rights in land, makes of itself no alteration in the principles hitherto observed in the recognition of a right to sub-settlement." Rule 2 goes on to say, "When no rights are proved to have been exercised or enjoyed by an under-proprietor during the period of limitation, beyond the possession of certain lands as seer or nankar, no sub-settlement can be made. But the

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claimants will be entitled, in accordance with the rules contained in the circular orders which have hitherto been in force in Oudh upon this subject, to the recognition of a proprietary right in such lands." That does not apply to this case. "To entitle the claimant to obtain a sub-settlement, he must show that he possesses an under-proprietary right in the lands of which the sub-settlement is claimed, and that such right has been kept alive over the whole area claimed within the period of limitation." So far it appears to their Lordships that the finding of the Courts is in favor of the plaintiff. He must be taken to have kept alive his rights until he was ousted in the year 1851, which their Lordships find upon the evidence was the time when he was ejected by the Rajah. Then follow these words, on which reliance has been placed: "He must also show that he, either by himself, or by some other person or persons from whom he has inherited, has, by virtue of his under-proprietary right, and not merely through privilege granted on account of service or by favor of the talukdar, held such lands under contract (pucka), with some degree of continuousness since the village came into the taluka;" and the next section explains what is meant by "some degree of continuousness." It has been argued that, inasmuch as this is a sankalp tenure of the kushust description, and held merely by favor, and not as of right, the plaintiff is excluded by the above words. Their Lordships are of opinion, however, that he is not so excluded; they adopt the findings of fact of the different Courts. The claim of the plaintiff is treated in the first place by the Settlement Officer, who originally dismissed it on the grounds which have been stated, as a claim not to "kushust," but to "birt sankalp." The judgment of the first Court upon remand is to this effect: "I consider it proved that there were five sankalp villages held by the plaintiff's family; that about 1256 Fasli" (it is agreed that that should stand 1258 Fasli) "they lost possession when Jadunath executed the conditional deed-of-sale. There is proof that the plaintiff held his share separately, from the defendant's own written note on the wajibularz presented by Jadunath, and as the defendant neglects to produce the deed, there is no evidence to

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show that Jadunath did or could legally convey the rights of Gopal Datt; that the Rajah had no right to eject him in 1856 Fasli; and he is now entitled to regain possession and to hold as an under-proprietor." That decision is confirmed by the Commissioner, Mr. Capper.

It appears to their Lordships that the effect of the finding is, that the plaintiff did hold, not merely in the words of the section, "through privilege granted on account of services or by favor of the talukdar," but by an under-proprietary right, which is distinguished from a holding through privilege or favor; that he was entitled to hold, not merely during the will of the talukdar, to which the latter part of the section appears to point, but *in invitum*; and their Lordships are of opinion that from the length of his holding, which appears to be considerable, and the circumstances which have been found in the case, it may fairly be inferred that he held "pucka," or under contract, or at all events under an arrangement from which a contract might be inferred. That being so, their Lordships are of opinion that he is not excluded, by the words which have been read, from the right of coming before the Court and proving his case.

It has not been seriously disputed that, if this be so, he has held with that degree of continuousness which is required by the Act.

For these reasons their Lordships are of opinion that the decision appealed against is right, and they will humbly advise Her Majesty that the judgment of the Commissioner be affirmed.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Young, Jackson, and Beard.*

SMALL CAUSE COURT REFERENCE.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

MACKILLICAN v. THE COMPAGNIE DES MESSAGERIES
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& 23.

*Bailment—Passenger's Luggage—Ticket—Conditions endorsed—Negligence
—Registration of Luggage—Common Carriers—Foreign Steam Ship
Company—Contract Act (IX of 1872), s. 151.*

In a suit for damages for loss of passenger's luggage by the wreck of a ship belonging to a foreign company, it appeared that the plaintiff had received a ticket in the French language, which on its face stated that it ought to be signed by the passenger, and that it was issued subject to certain conditions on the back. These conditions, among other things, stated that the company would not be responsible for loss or damage arising from accidents or risks of the sea; that the ticket was delivered subject to the conditions that certain articles of a specified nature should be made the subject of a special declaration, in default of which the company would not be liable; that the company would not be answerable for unregistered luggage; and that luggage might be insured at any of the company's offices. It was not stated where registration of luggage might be effected. The ticket was not signed by the plaintiff. The plaintiff alleged that he did not understand the French language, and that the conditions had not been explained to him by any person.

Held, that the company being a foreign company were not common carriers;

that the plaintiff was bound by the clauses and conditions on the back of the passage-ticket;

that none of the conditions had the effect of relieving the company from the consequences of their own negligence;

that, in order to establish a defence upon the ground that the plaintiff's luggage was not registered, it was necessary for the defendants to prove, not only that the plaintiff was bound by the conditions, but also that they were ready and willing to register the plaintiff's luggage, and that the plaintiff did not in fact register it;

that as the contract was made in Calcutta, the defendants were bound by the provisions of s. 151 of the Indian Contract Act.

THIS was a suit for damages for loss of luggage. On the 17th June 1877 the Steamer *Meikong*, belonging to the defendant com-

* Case stated for the opinion of the High Court under s. 7 of Act XXVI of 1864 by H. Millett, Esq., First Judge of the Calcutta Court of Small Causes.

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pany, by which the plaintiff was a passenger, was wrecked off Cape Guardafui, and the plaintiff's luggage was lost. The plaintiff sued the company as common carriers, alleging that the loss was caused by unskilful navigation, and by the negligence of the officers and crew of the vessel. The passage-ticket, which was in the French language, stated the name of the vessel, the name of the captain, the time of departure, the place of departure, and the place for which the passenger was booked, and also the amount of passage-money received. Towards the top of the ticket, in a conspicuous position, the following words were printed in red letters: "This ticket, in order to be available, ought to be signed by the passenger to whom it is delivered;" and at the foot of the ticket the following words, also in red letters, were printed: "I, the undersigned passenger, accept this passage-ticket subject to the clauses and conditions printed on the back." The material clauses and conditions were as follows:—

"The company is not responsible for losses or damages arising from accidents or risks of the sea, or from any other fortuitous cause."

"Passage-tickets are delivered subject to the conditions thereon."

"Specie, jewellery, and precious articles should be made the object of a special declaration; in default the passengers will be without remedy against the company."

"The company will not be answerable for unregistered luggage."

"The company will not be answerable for delays or damages which luggage may sustain; but luggage may be assured against maritime risks, by means of a moderate premium by virtue of the floating policies of the company. This assurance may be effected in all the offices of the company."

The plaintiff did not sign the ticket, and he stated that he did not understand the French language, and that the clauses and conditions on the ticket had not been explained to him. The learned First Judge of the Calcutta Small Cause Court found that the captain of the steamer failed to exercise that amount of care that a prudent man would, under similar circumstances, have done; that the plaintiff was not bound by the

clauses and conditions on the back of the passage-ticket; that, if he was so bound, the defendant-company had not shown that they were absolved from liability by means of such conditions; that the defendant-company were not common carriers; and that they were subject to the provisions of s. 151 of the Indian Contract Act. He further found, that the plaintiff had proved his damages, and, contingent upon the opinion of the High Court, gave the plaintiff a decree for the whole amount claimed.

The following were the questions submitted:—

(i)—Are the defendant-company common carriers?

(ii)—Is the plaintiff bound by the clauses and conditions at the back of the passage-ticket?

(iii)—Could the defendant-company, by express contract, or by special acceptance of conditions as to the terms upon which it was prepared to carry passengers and their luggage, protect itself from liability for loss resulting from its negligence?

(iv)—Has it done so in this case? *i. e.*, are the conditions wide enough to include loss resulting from negligence, and is the plaintiff bound by such negligence?

(v)—Whether it lay on the company, under all circumstances, to prove substantively that it had provided machinery for the registration of passenger's luggage?

(vi)—Under the circumstances set out, does the defendant-company come under the provisions of s. 151 of the Indian Contract Act, 1872?

(vii)—If the defendant-company come under the provisions of s. 151 of the Indian Contract Act, 1872, are such provisions absolute, or can the defendant-company protect itself from liability for negligence by special contract?

Mr. *Stokoe* for the plaintiff.

Mr. *Hill* for the defendants.

Mr. *Stokoe*.—The only question is, whether the defendant-company is discharged from liability by the terms of the passage-ticket. In the case of *Taubman v. The Pacific Steam Navigation Co.* (1), which was relied upon on the other side

(1) 26 L. T., N. S., 704.

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in the Court below, as showing that conditions of the nature of these would relieve a company from liability for negligence, the words were much wider. The condition there was, that the company would not be liable "under any circumstances whatever." [PONTIFEX, J.—Is not the case within s. 151 of the Contract Act? Have not the company taken as much care of the goods bailed to them as a man of ordinary prudence would of his own goods?] Our case is, that the company were guilty of negligence. The effect of this section is to prevent bailees from contracting themselves out of liability for negligence. [PONTIFEX, J.—Is a steamship company a bailee of goods which remain in their owner's possession?] Yes, the loss was occasioned by an act entirely beyond the plaintiff's control. In *Cohen v. The South-Eastern Railway Co.* (1), the ticket given to the plaintiff contained a proviso, that the company would in no case be responsible for damages to luggage to a greater extent than £6; and it was held, that the condition was void by reason of s. 7 of 17 and 18 Vict., c. 31, and s. 16 of 31 and 32 Vict., c. 119, and that the defendants were liable for loss to a greater extent than £6 caused by the negligence of their servants. In *Henderson v. Stevenson* (2) the ticket contained, on the back of it, an intimation that the company would not be liable for losses of any kind, or from any cause. It was proved that the plaintiff did not look at the ticket, and that his attention was not called to the intimation, and the House of Lords held, that the plaintiff was not bound by it. It has been decided by the Bombay High Court that carriers are governed by s. 151 of the Contract Act—*Kuverji Tulsidas v. The Great Indian Peninsula Railway Co.* (3) and *Ishwardas Golabchand v. The Great Indian Peninsula Railway Co.* (4). [GARTH, C. J.—This contract is to be performed on the high seas. Is there not any Carriers' Act which would apply?] It was assumed that, according to the *Peninsular and Oriental Co. v. Shund* (5), the contract was to be governed by the law of the place where it was entered into. [PONTIFEX, J.—The plaintiff did not sign the ticket; can

(1) L. R., 2 Exch. D., 253.

(3) 1 L. R., 3 Bom., 109.

(2) L. R., 2 Sc. App., 470.

(4) *Id.*, 120.

(5) 3 Moore's P. C. (N. S.), 272.

he be said to have complied with the conditions?] No, and even if the contract was completed, s. 151 prevents the defendants from contracting themselves out of their liability. It is against public policy to allow carriers to protect themselves from the consequences of their own neglect. The defendants point out where insurances may be effected, but they do not point out where a passenger is to register luggage, and the Court will not assume that the plaintiff was aware of the place. It is doubtful whether the defendants are common carriers. If they are, they are insurers, and they may protect themselves from liability by special contract—*The Duero* (1). But where the conditions imposed by a common carrier are capable of two constructions, the Court will lean to that construction which will prevent the carrier from contracting himself out of his liability—*Phillips v. Clark* (2) and *Grill v. General Iron Screw Colliery Co.* (3). The defendants are in this dilemma. If they are common carriers, they are insurers, and liable for damages however caused, and they will not be allowed to contract themselves out of their liability for negligence, unless they expressly say that they will not be liable, and that is assented to by the other party to the contract. If they are not common carriers, then they come under the Contract Act, and under s. 151 cannot relieve themselves from the duty of taking as much care of the goods bailed to them as a man of ordinary prudence would take of his own property. The contents of the ticket should have been explained to the passenger. [GARTH, C. J.—Why should not the defendants be able to contract themselves out of their liability under s. 10?] It would be an unlawful act. [GARTH, C. J.—Such a contract is not “forbidden by law” under s. 23; there is nothing in s. 151 to “forbid” it.] I contend that on the effect of s. 152 it would defeat the provisions of the Act. Section 152 gives the bailee power to affect his special liability by special contract. He may contract to incur a greater liability, but not a less.

Mr. Hill.—It has been contended that s. 151 of the Contract Act casts a duty on bailees of goods which they cannot contract

(1) L. R., 2 Ad. and E., 393.

(2) 2 C. B. (N. S.), 156.

(3) L. R., 3 C. P., 476.

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themselves out of. But the cases of *Kuverji Tulsidas v. The Great Indian Peninsula Railway Co.* (1) and *Iswardas Golabchand v. The Great Indian Peninsula Railway Co.* (2) do not go so far as that. The question referred in the first case was, whether the defendants could rely on the provisions of s. 152 as protecting themselves from liability in respect of goods carried by them for reward, and all that the High Court say is, that the Carriers' Act does not apply; that railway companies are governed by the Contract Act; and that they come under s. 151; and the Court held, that they do not come under the higher burden imposed on common carriers. Section 1 of the Contract Act provides that nothing in the Act shall affect the provisions of any Statute, Act, or Regulation not thereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract not inconsistent with the provisions of the Act. There is nothing in the Act to prevent parties to a contract of bailment importing into the contract a provision exempting the bailee from liability. Freedom of contract is not fettered otherwise than as provided in Chap. II. The case does not come within any of the provisions contained in ss. 10 and 23. Section 150 provides that if goods are bailed for hire, the bailor shall be responsible for any damages arising from faults in the goods bailed, whether he was or was not aware of the existence of such faults. But suppose *A* goes to *B*, and says,—“Send me your carriage for hire;” and *B* says,—“There are defects in it, but I will not be responsible for any damages;” and *A* takes the carriage and suffers damage; would not the contract be a good defence to an action? A contract by a bailee contracting himself out of liability cannot be said to be opposed to public policy. The cases of *Phillips v. Clark* (3) and *Grill v. General Iron Screw Colliery Co.* (4) are English cases, and I submit that English law does not apply to a French company. Prior to the Railway and Canal Traffic Acts, conditions very similar to those in this case were held to cover loss by negligence—*Peck v. North Staffordshire Railway Co.* (5). Before the Carriers' Act, 11 Geo. IV and 1 Wm. IV, c. 68, carriers

(1) 1. L. R., 3 Bom., 109.

(3) 2 C. B. (N. S.), 156.

(2) *Id.*, 120.

(4) 1. L. R., 3 C. P., 476.

(5) 10 H. L. C., 478.

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used to limit their liability by public notice—*Carr v. Lancashire and Yorkshire Railway Co.* (1), and they also had some power of imposing conditions on their common law liability by special acceptance without the assent of the customer to those conditions—*McManus v. Lancashire and Yorkshire Railway Co.* (2), or by special notice—*Walker v. York and North Midland Railway Co.* (3). The plaintiff must have known that the ticket contained the terms upon which the defendants contracted with him. It cannot be said that the omission by the defendants to require the plaintiff to sign the ticket amounted to a waiver of the conditions in the ticket. The question is, has the carrier given notice of the conditions upon which he will carry the passenger? If he has, that is sufficient to discharge him—*Zunz v. South-Eastern Railway Co.* (4) and *Van Toll v. South-Eastern Railway Co.* (5). In *Harris v. The Great Western Railway Co.* (6) the plaintiff deposited luggage with the company to be kept in the cloak-room of the company, and received a ticket, which on the face of it referred to conditions at the back which limited the company's liability. It was held (the Court having power to draw inferences), that the luggage must be taken to have been deposited subject to the conditions on the back of the ticket, and that the company was protected. The principle which applies to that case applies equally to this. In *Parker v. South-Eastern Railway Co.* (7) the facts were similar to those in *Harris v. The Great Western Railway Co.* (6). Two questions were left to the jury—(i) Did the plaintiff read, or was he aware of, the special conditions upon which the articles were deposited? (ii) Was the plaintiff, under the circumstances, under any obligation, in the exercise of reasonable and proper caution, to read or make himself aware of the conditions? Both questions were answered in the negative, and the Court, having no power to draw inferences, followed *Henderson v. Stevenson* (8), on the ground that the conditions had not been

(1) 7 Ex., 707.

(5) 12 C. B. (N. S.), 75.

(2) 4 H. and N., 327.

(6) L. R., 1 Q. B. D., 515.

(3) 2 E. and B., 750.

(7) L. R., 1 C. P. D., 618; S. C. on

(4) L. R., 4 Q. B., 539.

app., 2 *Id.*, 416.

(8) L. R., 2 Sc., App., 470.

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assented to, and held that the company was liable. The case was appealed, and a new trial was directed on the ground of misdirection, inasmuch as the plaintiff could be under no obligation to read the conditions; and that the second question left to the jury ought to have been whether the company did that which was reasonably sufficient to give the plaintiff notice of the conditions. This last case entrenches still further on *Henderson v. Stevenson* (1).

Mr. *Stokoe* was not called upon to reply.

The opinion of the Court (GARTH, C. J., and PONTIFEX, J.) was delivered by

GARTH, C. J.—We think that the questions referred to us should be answered as follows:—

(i)—The defendants, being a French company, are certainly not common carriers in the ordinary English sense of the word.

(ii)—We consider that the plaintiff was bound by the clauses and conditions on the back of the passage-ticket.

Although he may not understand French, he was a man of business contracting with a French company, whose tickets he knew very well were written in the French language. He had ample time and means to get the ticket explained and translated to him before he went on board; and it very plainly disclosed upon the face of it that the conditions endorsed were those upon which the defendants agreed to carry him. We think, therefore, that he was bound by those conditions.

The case of *Henderson v. Stevenson* (1) has been relied upon as showing, that if the plaintiff was not actually aware of the contents of the conditions, he could not be bound by them; but that case is not in point. There the ticket which the plaintiff received did not disclose upon the face of it that there were any conditions on the back, and it was found, as a fact, that the plaintiff was not aware of any such conditions.

Here the fact that there were conditions was plainly disclosed upon both sides of the ticket, and it was the plaintiff's own fault if he did not make himself acquainted with them. We think

(1) L. R., 2 Sc. App., 470.

that the principle of *Parker v. The South-Eastern Railway Co.* (1) and the observations of Lord Justice Bramwell in that case are directly applicable to the present.

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It was contended also, that the conditions were not binding upon the plaintiff, because he did not sign the ticket; but we think that the clause as to the passenger's signature was inserted for the benefit of the company, and that they had a right to waive it if they thought fit.

(iii)—We do not consider it necessary to answer this question.

(iv)—We are of opinion that none of the conditions have the effect of relieving the company from the consequences of their own negligence, the existence of which has been found in the case submitted for our opinion.

(v)—We think that, in order to establish a defence, upon the ground that the plaintiff's luggage was not registered, it was necessary for the defendants to prove, not only that the plaintiff was bound by the conditions, but also that they (the defendants) were ready and willing to register the plaintiff's luggage, and that he (the plaintiff) did not in fact register it. So far as we can see, they have failed to establish both these points. It has not been shown that, on the one hand, they were ready to register the luggage, nor on the other, that he did not in fact register it.

(vi)—We think that, as the contract was made in Calcutta, the defendants were bound by the provisions of s. 151 of the Indian Contract Act.

(vii)—We do not consider it necessary to answer this question.

The judgment, therefore, that has been entered for the plaintiff will stand, and the defendants must pay the costs of this reference.

Attorneys for the plaintiff: Messrs. *Watkins and Watkins*.

Attorney for the defendants: Mr. *Orr*.

(1) L. R., 1 C. P. D., 618; S. C. on app., 2 *Id.*, 416.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Mitter.

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July 19. * SHUMSHER ALLY (DEFENDANT) v. KURKUT SHAH (PLAINTIFF).*

*Review—New Trial—Mofussil Small Cause Court Act (XI of 1865), s. 21
—Civil Procedure Code (Act X of 1877), s. 624.*

A Judge of a Mofussil Small Cause Court has jurisdiction to direct a new trial of a case tried by his predecessor, s. 21 of Act XI of 1865 not having been repealed by the Civil Procedure Code 1877.

Per GARTH, C. J.—The Judge, however, in dealing with applications for new trial under s. 21, should have regard to the rule laid down in s. 624 of the Code of Civil Procedure.

THIS was an application made to the Officiating Judge of the Sealdah Small Cause Court, under s. 21 of Act XI of 1865, for a new trial of a case, which had been decreed in favor of the plaintiff by Mr. Ryland, the permanent Judge of the Court. The plaintiff contended, *inter alia*, that, under s. 624 of the Code of Civil Procedure, no application could be made to the Officiating Judge for a new trial. The plaintiff contended that the sections in the Civil Procedure Code relating to reviews, which are made applicable to Courts of Small Causes, had virtually repealed s. 21 of Act XI of 1865, and that at any rate no new trial could be granted by a Small Cause Court Judge of a case tried by his predecessor unless upon the ground of some clerical error in the proceedings, or the discovery of some new and important matter or evidence.

Baboo Saroda Churn Mitter for the plaintiff.

Munshee Serajul Islam for the defendant.

The following judgments were delivered :—

GARTH, C. J.—As s. 21 of Act XI of 1865 has not been repealed or affected by the Civil Procedure Code, 1877, I am of opinion

* Reference, No. 12 of 1880, from Baboo Boloram Mullick, B.L., Officiating Judge of the Small Cause Court at Sealdah, dated the 8th May 1880.

that the provisions of that section are still in force with regard to applications for a new trial, and that they are not directly controlled in their operation by s. 624 of the Civil Procedure Code.

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That the two procedures (*viz.*, the one for a new trial, and the other for review) are both still in force, has virtually been decided by Mr. Justice Jackson and Mr. Justice Tottenham in the Small Cause Court Reference, Nos. 69 and 70 of 1879.

At the same time I think it right to add that, having regard to the nature of the question referred to us, in my opinion any Small Cause Court Judge, in dealing with applications for a new trial under s. 21, is bound to observe and respect the manifest intention of s. 624, which is indeed only an enactment by the Legislature of the rule which had been previously laid down by this Court as a guide to the Judges of subordinate Courts when dealing on review with their predecessors' judgments: see *Ellem v. Basheer* (1) and *Roy Meghraj v. Beejoy Gobind Burrall* (2).

It is to my mind manifestly improper for one Judge to review, or grant a new trial of, a case decided by his predecessor, where the alleged error consists in the determination of some question of law or fact upon which the one Judge has only the same materials and the same means of forming a satisfactory conclusion as the other.

I think that it would be quite as indecent under such circumstances for one Small Cause Court Judge to reverse a decision of his predecessor, as it would be for one Division Bench of a High Court, consisting of two Judges, to reverse the decision of another Division Bench of the same Court, also consisting of two Judges.

Our attention was directed during the argument to a case decided by the Privy Council in the year 1876—*Reasut Hossein v. Haljee Abdulollah* (3); but the point now under consideration was not discussed or even alluded to in that case.

The question there arose was, whether one District Judge had jurisdiction to review the decision of his predecessor for any cause other than some positive and apparent error of law, or the

(1) I. L. R., 1 Calc., 184.

(2) *Id.*, 197.

(3) I. L. R., 2 Calc. 131; S. C., L. R., 3 I. A., 221.

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discovery of new evidence; and their Lordships state in their judgment that, looking to the extreme generality of the terms used in ss. 376 to 378 of Act VIII of 1859, they were not prepared to say that one Judge had absolutely no jurisdiction to review the decision of his predecessor, whenever the parties failed to show that there was some positive error of law in the former judgment, or new evidence to be brought forward.

That case was decided upon the language of the Civil Procedure Code of 1859, which differs in some respects from that of the new Code, and in which, notably, there was no provision similar to that in s. 624.

This section seems to me to declare very plainly what the views of the Legislature are upon the point now under discussion.

It is very probable that, at the time when these review sections of the Civil Procedure Code were passed, the operation of s. 21 of the Act of 1865 did not receive sufficient attention.

As Small Cause Court cases in this country are tried, both as regards law and fact, by the Judge alone, it is difficult to conceive any reasons which would justify a new trial which would not also afford good grounds for a review; and if so, the principle, if not the actual provisions, of s. 624 ought to be applicable to new trials as well as to reviews.

Although, therefore, in this instance, the Small Cause Court Judge has jurisdiction, under the circumstances, to entertain the application for a new trial, I think that, in the exercise of that jurisdiction, he should be guided by the considerations to which I have referred.

MITTER, J.—I am also of opinion that the present Officiating Judge of the Court of Small Causes at Sealdah has jurisdiction to entertain an application for a new trial. As to the grounds upon which he should grant a new trial in the case out of which this reference has arisen, I express no opinion, as that is not one of the questions referred to us.

APPELLATE CIVIL.

Before Mr. Justice Morris and Mr. Justice Prinsep.

ALMAS BANEE AND OTHERS (PLAINTIFFS) v. MAHOMED RUJA AND
OTHERS (DEFENDANTS).*

1880
June 10.

Limitation Act (XV of 1877), s. 25 ; sched. ii, art. 66—Bond.

Where a bond, by its terms, stated that money advanced should be repaid on the 30th Pous 1283 B. S., and it so happened that, in the year 1283, the month of Pous consisted only of twenty-nine days (the 29th Pous, answering to the 12th January 1877), *held*, that a suit brought on the 13th January 1880 was in time.

THIS was a reference made to the High Court under s. 617 of Act X of 1877.

The plaintiff brought a suit on the 1st Magh 1286, B. S. (corresponding with 13th January 1880) to recover a sum of money advanced to the defendant, and secured by a bond dated the 16th Kartic 1283 B. S., the due date of repayment of the advance under the bond being stated to be the 30th Pous 1283 B. S.

It so happened that, in the year 1283 B. S., the month of Pous consisted only of twenty-nine days, the last day of the month corresponding with the 12th January 1877.

The plaintiff contended that, as there was no 30th Pous in the year 1283; his suit was in time if brought on the 1st Magh 1283.

The defendant contended, that the suit was barred by limitation, it not having been brought on or before the 29th Pous 1283, corresponding with 12th January 1877.

The Munsif held, that the parties evidently intended that the bond should be payable on the last day of the month of Pous 1283, irrespective of the number of days the month should consist of, and that, therefore, the suit was barred; but, at the request of the plaintiff, he referred the case for the opinion of the High Court.

* Civil Reference, No. 6 of 1880, from Baboo Karunamoy Banerjee, B. L., Sudder Munsif of Sudharam, in the District of Nonkhally, dated the 26th February 1880.

1880

ALMAS
BANEE
v.
MAHOMED
RUJA.

The opinion of the Court (MORRIS and PRINSEP, JJ.) was as follows :—

. MORRIS, J.—This is a case referred by the Sudder Munsif of Sudharam, under s. 617 of the Code of Civil Procedure, raising the question of the date of payment fixed in a bond as governing the application of the law of limitation.

The date for payment of the money due under the bond is entered in it as the 30th Pous 1283. The month of Pous varies, sometimes containing twenty-nine and sometimes thirty days. In the year 1283 the month of Pous contained only twenty-nine days, and the 29th, or the last day of Pous, corresponded with the 12th January 1877.

The present suit, to realize the money due on this bond, was brought on the 13th of January 1880, and the point submitted to us is, whether the suit has been brought within three years from the date on which the money became payable.

The Munsif states as his opinion, that “the parties never intended that the day of repayment should be in the month of Magh. By ৩০ পৌষ (30th Pous) the parties, according to the custom of the country, evidently intended the last day of the month of Pous 1283, irrespective of the number of days the month should consist of.”

This is, no doubt, one mode of interpreting this term of the contract. At the same time we think that, when the bond, by its terms, gives expressly thirty days from the commencement of Pous as the limit of payment, the period of limitation applicable to a suit brought to enforce payment should be reckoned from such thirtieth day. Both parties, at the time of execution of the bond, understood that there were thirty days in Pous of that year, and so made the thirtieth day the limit day of the term of payment. There is nothing in their conduct, or in the terms of the agreement, from which it can be inferred that they intended the 29th of Pous to be the limit. We are not aware that the custom of the country is as stated by the lower Court, nor does it appear that it was established in evidence in the present case. Consequently, the present contention of the obligor is, in our opinion, in direct opposition to this the original understanding between the parties. The obligor, as it seems to us, wishes to

evade, by this plea of limitation, the payment of a just debt and to act contrary to the expressed intentions of the parties at the time of entering into the contract.

Accordingly we are of opinion that this suit is not barred by limitation.

1880

ALMAS
BANEE
v.MAHOMED
RUJA.

PRIVY COUNCIL.

GOURCHANDRA RAI (DEFENDANT) v. PROTAPCHANDRA DASS
(PLAINTIFF).

P. C.*

1880

March 5.

[On Appeal from the High Court at Fort William in Bengal.]

Principal and Surety—Giving Time—Interest paid in advance—Discharge of Surety—Accommodation Acceptor—Contract (Act IX of 1872), s. 135.

The drawer of hundis paid advance interest to the holder to obtain time, which he did obtain, for payment after due date. *Held*, that the liability of an accommodation acceptor of the hundis depended on whether he knew of and consented to this arrangement.

Held on the merits, that he knew of, and consented to, advance interest being taken.

APPEAL from a decree of a Divisional Bench of the High Court of Bengal, dated 16th May 1878, reversing, so far as it affected this appellant, a decree of the Subordinate Judge of Dacca, dated 14th September 1876.

The facts of the case and judgment appealed from are reported in the Indian Law Reports, 4 Calc., 132.

Mr. *Cowie*, Q. C., and Mr. *Dojne*, for the appellant, argued, that the plaintiff had failed to prove that such an assent had been obtained from the surety as was contemplated in the proviso contained in the 135th section of the Indian Contract Act, 1872, which was the law governing this case, and that, therefore, the surety had been discharged.

Mr. *Leith*, Q. C., and Mr. *Graham*, for the respondent, were not called upon.

Their Lordships' judgment was delivered by

SIR J. W. COLVILLE.—Accepting the facts found by both the

* *Present*:—SIR J. W. COLVILLE, SIR B. PRACOCK, SIR M. E. SMITH, and

* SIR R. P. COLLIER.

1880

GOUR-
CHANDRA
RAI
v.
PROTAP-
CHANDRA
DASS.

Courts in India, their Lordships agree with the High Court that the liability of the appellant, as accommodation acceptor of the hundis, depends on the answer to be given to the question whether he knew of, and consented to, the advance interest being taken. The High Court has answered the question in the affirmative, and their Lordships entirely agree in that conclusion. Monohur Laha's evidence alone is sufficient to establish the fact that the defendant did know of, and consent to, the payment of the advance interest; and he was a witness called by the appellant. Nor do their Lordships think that the testimony of the witnesses adduced by the plaintiff is, though exceptions may be taken to parts of it, altogether inconsistent, as has been argued, with that of Monohur Laha. That which relates to a conversation between the plaintiff and defendant in the billiard-room of the former, upon which there was no cross-examination, is quite consistent with all that Monohur Laha has deposed to. Again, the probabilities of the case appear to their Lordships to be all in favor of the conclusion of the High Court. Pogose, the drawer of the hundis and the party primarily liable upon them, was absent from his place of business; his affairs were evidently in a very shaky condition; and although it was possible that when he came back again he might be able to make some arrangement for the payment of the hundis, he had no present means of meeting them. In these circumstances it is hardly conceivable that the plaintiff would enter into a transaction, the effect of which would be to relieve the only solvent party from liability upon the hundis. On the other hand, it was much to the interest of the defendant to take the chance of the re-establishment of Pogose's credit, and therefore to assent to such an arrangement as was actually made.

Their Lordships, therefore, will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

Appeal dismissed.

Agent for the appellant: Mr. T. L. Wilson.

Agents for the respondent: Messrs. Watkins and Lattey.

GRISHCHUNDER CHUCKERBUTTY AND ANOTHER, GUARDIANS OF
 DWARKANATH CHUCKERBUTTY, A MINOR (DEFENDANTS) v. JIBANESWARI
 DEBIA, MOTHER AND GUARDIAN OF KAILAS CHUNDER CHUCKERBUTTY
 (PLAINTIFF). P.C.*
1880
May 4.

AND

GRISHCHUNDER CHUCKERBUTTY, GUARDIAN OF DWARKANATH
 CHUCKERBUTTY, A MINOR (DEFENDANT) v. BISESWARI DEBIA, MOTHER
 AND GUARDIAN OF PROSUNNO KUMAR CHUCKERBUTTY (PLAINTIFF).

[On Appeal from the High Court, Bengal.]

Sale in Execution of the "right, title, and interest" of a Judgment-Debtor in a partly executed Decree—Possession of land attached under Reg. V of 1805, s. 26.—Right of Purchaser.

A decree of the year 1843 awarded to persons, afterwards represented by the respondents, the possession of a moiety of a taluk, which had been since 1837, and remained till 1866, under attachment by the Collector in virtue of an order made under Reg. V of 1812. The Court which granted the decree, intending to execute it, approved the proceedings of an Amin purporting to put the decree-holders into constructive possession of a certain number of mouzas of the taluk.

In 1850, the appellants, in execution of a decree for money obtained by them against the respondents, purchased at a sale, amongst other things, "their right, title, and interest" in the decree of 1843. *Held*, that possession of the mouza having been delivered, so far as it could be delivered, considering the attachment to which the taluk containing these mouzas was subject, the decree of 1843 had been so far executed; and that what was acquired by the appellants at the execution-sale was only the unexecuted portion of the decree of 1843.

APPEALS, on leave obtained, from decrees of the High Court of Bengal, dated 12th June 1876, affirming decrees of the Subordinate Judge of Mymensing, dated 4th January 1875, so far as they were adverse to the defendants, appellants. The suits were originally dismissed by the Court of first instance, on the ground of limitation (14th June 1873); but, on appeal to the High Court, having been remanded for trial, as being not barred by limitation, they were tried and decided in favor of the plaintiffs, against the appellants—decisions which were upheld in the High Court.

* *Present*:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, and
 SIR R. P. COLLIER.

1880

GRISH-
CHUNDER
CHUCKER-
BUTTY
v.JIBANESWA-
RI DEBIA.GRISH-
CHUNDER
CHUCKER-
BUTTY
v.BISSESWARI
DEBIA.

The same question was raised by both appeals, viz., whether the entire rights of the respondents, and of those whom they represented, under a decree dated 11th November 1843 of the Court of the Principal Sudder Amin of Mymensing, had been purchased in 1850 on behalf of the predecessors in estate of the appellants, or only such portion of that decree as then remained unexecuted; it being contended by the respondents that, at the date of the sale, the decree had been partly executed.

Mr. *Cowie*, Q. C., and Mr. *J. Graham*, Q. C., for the appellants.

The respondents did not appear.

The facts of the case are stated in the judgment of their Lordships, which was delivered by

SIR R. P. COLLIER.—This case was reduced during the argument to a point of law, which becomes intelligible upon the statement of a few facts.

Brojo Kishor and Ram Kishor were brothers, joint in estate, of whom Ram Kishor died sometime before 1835, leaving two sons, Ram Kumar and Nobo Kumar. In the year 1835 an estate, consisting of an 8-anna share in a taluk, called Newaz Ali, and belonging to one Abdul Samad, was bought in the name of Ram Kumar, but with the joint funds of the family. Brojo Kishor died in 1836, having, shortly before his death, separated from the other branch of the family. He left two widows, each of whom adopted a son, one adopted son being Ishan Chunder and the other Mohesh Chunder. Upon, or sometime after, the death of Brojo Kishor, Ram Kumar set up an exclusive title to the purchased estate; and the representatives of Brojo Kishor, who at that time were the adopted sons, in the year 1839, brought a suit against Ram Kumar and his brother Nobo Kumar, for the purpose of having their title declared and obtaining possession of Brojo Kishor's moiety of this property, and obtained a decree awarding to them that possession on the 11th November 1843. Both the plaintiffs in that suit afterwards died, Ishan Chunder being now represented by his widow Jibaneswari, the respondent in one of these appeals, and

Moresh Chunder by his adoptive mother Biseswari, the respondent in the other appeal. After their death, and in or about 1848, the representatives of Ram Kishor obtained a decree against the two last-named widows, as the then representatives of Brojo Kishor, in respect of a money demand against Brojo Kishor. They proceeded to the execution of that decree. The usual notice and proclamation of sale were made, and on 16th July 1850 the appellants bought, in pursuance of the usual proclamation, among other things, the right, title, and interest of the judgment-debtors in the decree of the 11th November 1843. The question in the cause is, what passed by the sale of that decree?

1880

GRISH-
CHUNDER
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RI DEBIA.GRISH-
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DEBIA.

It is necessary to state that, in the year 1837, the whole taluk of Newaz Ali, which was subject to a number of disputed claims, was attached by an order of the Civil Court, and remained in the possession of an officer of the Collector until the year 1866. But, notwithstanding this, the Court, upon the representatives of Brojo Kishor obtaining their decree in November 1843, attempted to give the decree-holders, at all events, constructive possession of a certain number of the mouzas, part of their share of the purchased estate, and for that purpose deputed an Amin to ascertain what belonged to them. The Amin made a lengthened investigation, and, after hearing both parties, and going over the ground, he marked out by sticks and posts certain lands which, according to his view, the decree-holders were entitled to, and he gave them, or professed to give them, possession of those lands; and he also required the ryots to sign kabuliats with respect to these lands. These proceedings came before the Court, and were approved by the Court. It is undoubted, therefore, that the Court intended to deliver possession as far as it could, and believed that it had the right to deliver possession effectual for the execution of the decree to the decree-holders of a certain number of mouzas. The question is, whether the representatives of Ram Kishor, buying the decree on the 16th of July 1850, bought with it those mouzas with respect to which it had been executed in the manner described, or only so much of the property to which it relates with respect to which it remained unexecuted?

1880

GRISH-
CHUNDER
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BUTTY
v.BISWARI
DEBIA.

The attachment continued until 1866, when it was discharged. Thereupon Jibaneswari brought her suit for the purpose of obtaining possession of her share of those mouzas of which, as she alleged, possession had been given in execution of the decree of the 11th November 1843. Biseswari also brought a suit for the purpose of obtaining her share of the same mouzas. These suits involve the same question, and the same judgment applies to both of them. The defendants alleged their right to the whole of that which had been bought of Abdul Samad. The first Court in India found in favor of the plaintiffs in the two suits with respect to the greater part of the property. That decision was affirmed by the High Court, upon the grounds on which it was given, the main ground of both decisions being that, in point of fact, possession was delivered of the mouzas in question before the sale of the 16th August 1850, as far as it could be delivered, considering the Government attachment to which the whole taluk was subject, and that the delivery of the possession, such as it was, was effectual to execute the decree.

Their Lordships have felt some difficulty about this case ; but, on the best consideration they are able to give it, they do not see their way to reversing the decision of the High Court. It has been contended, with a good deal of force, that no actual possession could have been given while the whole taluk was under attachment. At the same time, the Court appear to have undertaken to execute the decree, to give such possession as could be given, and to have adopted proceedings which they deemed proper for that purpose, and possession has been given in the manner described of the mouzas now in question. That being so, the question is, what was sold by the description of "the right and interest of the judgment-debtors in the decree?" Was it that of which possession had been given in the manner described, or was it only of that portion of the decree which remained to be executed? Their Lordships, on the whole, think it must be taken that what was put up for sale, what was intended and what was understood to be sold, must have been *the unexecuted portion only of the decree*. Under these circumstances, although the case is not unattended with difficulty, their Lordships will humbly advise Her Majesty that the deci-

sion of the High Court be affirmed. Inasmuch as the respondents have not appeared by counsel, there will be no costs of this appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Watkins and Lattey*.

Solicitor for the respondents: Mr. *T. L. Wilson*.

APPELLATE CRIMINAL.

Before Mr. Justice White and Mr. Justice Field.

GOGUN CHUNDER GHOSE *v.* THE EMPRESS.*

Evidence, Admissibility of--Judgment in Civil Suit out of which Criminal Prosecution arises.

In suit by *A* against the obligors of a bond, the Court held, for the reasons stated in its judgment, that the signatures of the obligors were not genuine, and directed the prosecution of *A* on a charge of forgery. On the trial of *A* before a jury, this judgment of the Civil Court was put in evidence on behalf of the prosecution, and its contents commented on by the Sessions Judge in his charge to the jury.

Held, that this judgment had been illegally admitted.

Mr. *M. Ghose* and Baboo *Bykant Nath Dass* for the accused.

THE facts of this case sufficiently appear in the judgment of the Court (WHITE and FIELD, JJ.), which was delivered by

WHITE, J. — This was an appeal by the prisoner Gogun Chunder Ghose against a conviction under s. 471 of the Code and a sentence of five years' rigorous imprisonment.

The circumstances out of which the prosecution arose are these: The prisoner had brought a suit against Basheeram Mundle and his two brothers, Babooram Mundle and Dharani Dhur Mundle, for the recovery of 726 rupees, being the amount of principal and interest due upon a kistibandi, or bond, alleged to have been executed in favor of the prisoner by the three brothers.

* Criminal Appeal, No. 433 of 1880, against the order of W. H. Page, Esq., Officiating Additional Sessions Judge of the 24-Pargannas, dated the 10th June 1880.

1880

GRISH-
CHUNDER
• CHUCKER-
BUTTY
v.

JIBANESWA-
RI DEBIA.

GRISH-
CHUNDER
CHUCKER-
BUTTY
v.

BISESWARI
DEBIA.

1880

July 16.

1880

GOGUN
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EMPRESS.

The Munsif found that the bond had been executed by one of the three, Dharani Dhur, but dismissed the suit, because he was of opinion that the signature of the other two defendants, Basheeram and Babooram, were forged; and he entertained so strong an opinion upon this point that he directed this prosecution, which we are now considering, to be instituted against the prisoner for forging the kistibandi, and using it as genuine knowing it to be forged.

The case has been tried by a jury, and they have come to a unanimous verdict that the prisoner is guilty of using this bond knowing it to be forged, and in answer to a question they said, that they found the signatures of Basheeram and Babooram to be forged, but the signature of Dharani Dhur to be genuine. At the trial, the judgment of the Munsif in the civil suit, although objected to on the part of the prisoner, was put in evidence by the prosecution, and read out to the jury, and the substance of the judgment was also referred to by the Sessions Judge in his charge to the jury.

The ground of the appeal is, that this judgment was improperly admitted as evidence, and that eliminating the judgment there is not sufficient evidence to justify the verdict. There can be no doubt the judgment was improperly received. Technically it was inadmissible, because it was not between the same parties, the present parties technically being the Queen-Empress on the one hand, and the prisoner on the other, and the respective parties in the civil suit being the prisoner and the three defendants; and furthermore, it was not admissible on the substantial ground that the issues in the civil and criminal suit were not identical, and that the burden of proof rested in each case on different shoulders. It was not necessary for the Munsif in the civil suit to find more than that the execution of the bond by the three defendants was not proved. When the Munsif went further and pronounced the bond a forgery, and directed a prosecution, it was not a decision on the question of forgery, but merely an opinion which, although he was entitled to give expression to, ought no more to have been put in evidence on the present charge than the opinion of a Magistrate who commits a prisoner to take his trial upon a criminal charge.

The Judge, in his summing up, draws the attention of the jury to this judgment and to the Munsif's opinion contained in it, and uses the following words: "The Munsif believed that one of the brothers, Dharani, executed the document, and that the other names were added afterwards by the prisoner, or with his knowledge, and with a dishonest intent. Whether this or whether all three names are forgeries, the offence is the same." It is true that the Judge, later on, says to the jury—"You are not in any way bound by the finding of the Munsif;" and that he also, still later on, draws their attention to the fact that in the civil suit the *onus probandi* was on the prisoner, whereas at the trial of forgery the onus was on the prosecution. But inasmuch as neither the judgment nor the Munsif's opinion were evidence, the Judge, if he referred to them at all, ought to have told the jury not merely that they were not bound by them, but that it was their duty to dismiss them altogether from their mind. We have next to consider whether, independently of the objectionable evidence, there is sufficient evidence to justify the verdict of the jury.

[The learned Judge then proceeded to consider the other evidence in the case, and ultimately arrived at the opinion that, independently of the Munsif's judgment, there was not sufficient evidence which, even if believed, pointed with reasonable certainty to the guilt of the accused, and therefore made an order of acquittal.]

Conviction set aside.

APPELLATE CIVIL.

Before Mr. Justice Pontifex and Mr. Justice McDonell.

AJOODHYA PERSHAD AND OTHERS (PLAINTIFFS) v. GUNGA PERSHAD AND ANOTHER (DEFENDANTS).*

1880
June 10.

Appeal against order rejecting Plaintiff—Plaint insufficiently Stamped—Court Fees Act (VII of 1870), s. 12, para. 1; sched. ii, div. ii, art. 17, part iii—Civil Procedure Code (Act X of 1877), s. 1, tit. "Decree."

An appeal lies against an order rejecting a plaint on the ground of its being insufficiently stamped.

* Appeal from order, No. 64 of 1880, against the order of Roy Matadeen, Bahadur, Subordinate Judge of Gya, dated the 21st November 1879

1880
GOGUN
OHUNDER
GHOSE
v.
THE
EMPRESS.

1880
 AJOODHYA
 PERSHAD
 v.
 GUNGA
 PERSHAD.

THE plaint in this case was declared by the Court to be insufficiently stamped under sched. ii, div. ii, art. 17, part iii of the Court Fees Act, and the plaintiffs failing to affix the additional stamps, the plaint was rejected.

From this decision the plaintiffs appealed.

Baboo *Turuck Nath Sen* for the appellants.

Baboo *Hury Mohun Chuckerbutty* for the respondents.

The judgment of the Court (PONTIFEX and McDONELL, JJ.) was delivered by

PONTIFEX, J.—We agree with the Court below that the plaint was insufficiently stamped under art. 17 of the Court Fees Act, cl. 3.

Preliminary objections were taken to the appeal, on the ground that the order of the lower Court was final under s. 12 of the Court Fees Act, which enacts, that “every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal, shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit.”

But of s. 588 of the Civil Procedure Code, as it originally stood, cl. (c) provided that an order under s. 54, cl. (b)—being such an order as the present is—should be appealable, thereby removing the finality declared by s. 12 of the Court Fees Act.

A second preliminary objection taken was, that although by s. 588, cl. (b), an appeal was given in respect of rejection of plaints under s. 54, cl. (b), yet, under s. 588 as amended, no appeal is now given. But then, on behalf of the appellants it was urged, that, under the definition of “decree” in the amended Code, an order rejecting a plaint is within the definition. Similarly, the new definition of “decree” also includes questions under s. 244, which were made appealable by cl. (j) of s. 588 as it originally stood, but which are omitted in s. 588 as amended.

We think though the amended s. 588 applies only to appeals from orders directing that the plaint shall be amended, and not to rejection of a plaint, yet the amended definition of the word

"decree" shows that an appeal lies in the present case. But although an appeal lies, we are of opinion that the decision of the lower Court is correct. The appeal will, therefore, be dismissed with costs.

1880
AJOODHYA
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PESHAD.

Appeal dismissed.

Before Mr. Justice Mitter and Mr. Justice Maclean.

KHEMNA GOWALA (DEFENDANT) v. BUDOLOO KHAN (PLAINTIFF).*

1880
July 8.

*Arbitration—Civil Procedure Code (Act X of 1877), Chap. xxxvii—
Kabuliat, Suit for—Suit under Act X of 1859.*

Notwithstanding that chap. xxxvii of Act X of 1877 (in reference to arbitration) does not refer specially to suits brought under Act X of 1859, yet if both parties to a suit for a kabuliat brought under the latter Act agree to refer the matters in dispute between them to certain arbitrators named by them, and file a joint petition in the Court of the Deputy Collector, stating that they had so agreed, and praying that the case may be referred to such arbitrators, neither of them will be afterwards at liberty to object to a decree made, embodying the award of the arbitrators, on the ground that the reference to arbitration was irregular, and not warranted by any of the provisions of Act X of 1877.

When a case has been so referred, the arbitrators are at liberty to determine what appears to them to be a fair and equitable rate of rent, and notwithstanding the amount so found is less than that demanded by the plaintiff in his plaint, the Court out of which the reference issued is not at liberty on that ground to dismiss the suit, but is bound to order the defendant (with the alternative of eviction) to execute a kabuliat in favour of the plaintiff, engaging himself to pay rent to the plaintiff at the rate determined by the arbitrators to be fair and equitable.

THE plaintiff in this case, Budoloo Khan, sued the defendant, Kheemna Gowala, who was his tenant, in the Court of the Deputy Collector of Chatra, to obtain a kabuliat at an enhanced rate of rent for the land held under him. It appeared that the defendant had been previously paying rent at the rate of Rs. 8 per annum. The rent demanded by the plaintiff in his plaint was

* Appeal from Appellate Decree, No. 2055 of 1879, against the decree of R. Towers, Esq., Officiating Judicial Commissioner of Chota Nagpore, dated the 13th June 1879, reversing the decree of Baboo Hurihur Churn Lal, Deputy Collector of Chatra, dated the 8th November 1878.

1880 Rs. 21-15. When the case came on to be heard before the Deputy
 KHEMNA Collector, both parties agreed to refer all matters in dispute
 GOWALA between them to certain arbitrators named by them, and filed a
 v. joint petition, praying that the case might be referred to such
 BUDOLOO arbitrators. The Deputy Collector made the order prayed for.
 KHAN.

The arbitrators came to the conclusion that Rs. 15 per annum was the fair and equitable rent payable by the defendant to the plaintiff, and their award was, that the defendant should execute a kabuliat in favor of the plaintiff, engaging himself to pay rent in future at that rate.

On the award being returned to the Deputy Collector, the defendant objected, first, that there was no provision in Act X of 1877, empowering a Civil Court to refer to arbitration a suit of this description,—namely, a suit brought under Act X of 1859; and secondly, that the arbitrators having found the fair and equitable rent for the land held by the defendant under the plaintiff to be Rs. 15 per annum, and not Rs. 21-15, as claimed by the plaintiff in his plaint, the Court was not at liberty to order the defendant to give a kabuliat at the rent allowed by the arbitrators, but was bound to dismiss the suit of the plaintiff with costs. In support of this contention the case of *Gogon Munji v. Kashishwary Debi* (1) was relied upon. The Deputy Collector dismissed the suit with costs upon both grounds.

Upon appeal to the Officiating Judicial Commissioner of Chota Nagpore, the decision of the Deputy Commissioner was reversed with costs, and a decree passed, ordering the defendant to execute a kabuliat as directed by the award of the arbitrators. Against this decree the defendant appealed to the High Court.

Baboo Jogendra Chunder Dey for the appellant.

Mr. Sandel for the respondent.

Baboo Jogendra Chunder Dey.—The judgment of the lower Court of Appeal is wrong, because the Code of Civil Procedure, in chap. xxxvii, contains no provisions empowering any Civil Court to refer to arbitration any case instituted under Act X of 1859, and the reason for this is obvious. These cases are of a

(1) I. L. R., 3 Cal., 498.

1880

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special character, they are suits between opulent or comparatively opulent landlords, who are able to command the assistance of the best professional skill and experience on the one hand, and needy ignorant and defenceless ryots, usually without the means of securing similar assistance, on the other. It is true that, in other suits, the rich and the poor appear frequently as antagonistic parties; but while in all other suits this is an accident, in this particular class of suits it is an almost invariable rule. It would not, therefore, be rash to assume that, while the Legislature intended to permit ordinary cases to be referred, with the consent of parties, to the determination of non-professional arbitrators, it deliberately omitted to extend that permission to the large and important class of cases in which the knowledge, experience, and humanity of its own officers might be the only shield between the weak and the strong, the oppressor and the oppressed. As to the other point,—namely, whether upon its appearing from the award of the arbitrators that the rate of rent demanded by the plaintiff in his plaint was exorbitant and excessive, and not what they found to be the fair and equitable rental, the Court of first instance was not right in dismissing the plaintiff's suit, I submit that this has been decided by authority—see *Gogon Manji v. Kashiskwary Debi* (1) and *Gholam Mohamed v. Asmut Ali Khan* (2). It is true that in all other suits in the mofussil, if a plaintiff has claimed a larger sum than is ultimately found to be really due to him, a decree is passed in his favor for such sum, and he also gets his costs for the amount decreed to him; but that is because ordinary cases differ, as I have already observed, from the class of suits which includes the case now before the Court; and also because it is provided by s. 13 of Act X of 1859, that “no ryot who holds land without a written engagement shall be liable to pay any higher rent for such land than the rent payable for the previous years, unless a written notice has been served on such ryot in or before the month of Choit, specifying the rent to which he will be subject for the ensuing year.” In the present case no notice was served on the defendant informing him that he would be required to pay

(1) I. L. R., 3 Cal., 498.

(2) B. L. R., Sup. Vol., 974; S. C., 10 W. R., F. B., 14.

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at the rate of Rs. 15 for the ensuing year. If any notice was in fact served upon him, it was a notice that he would be required to pay at the rate of Rs. 21-15. Had the claim made upon him been for Rs. 15 only, perhaps he would not have resisted it. Again s. 9 of the same Act provides that "the tender to any ryot of a pottah, *such as the ryot is entitled to receive*, shall be held to entitle the person to whom the rent is payable to receive a kabuliat from such ryot." The tender of *such a pottah as the ryot is entitled to receive*, which in the present would be a pottah stating the rent reserved to be Rs. 15 per annum, appears, therefore, to be a condition precedent to the right to demand a kabuliat; but no such tender was made before the institution of this suit.

Mr. Sandel for the respondent. — By the general law of the land, all parties to disputes are entitled to refer any matters in dispute between them to arbitration; and there is nothing either in Act X of 1877 or in any other Act of the Legislature which makes the fact, that a suit under Act X of 1859 is pending between them sufficient to deprive them of this right. As to the second point, if the submission to arbitration be ruled to have been a good submission, as it is submitted it is, then it follows, that both parties voluntarily agreed that the arbitrators should decide *all* matters in dispute between them in that suit. The matters in dispute were not merely what was the proper rent to be assessed on the land, the rent of which the plaintiff claimed to enhance, but every other matter of defence which the defendant might urge; and the last, but not the least in importance, was, whether the plaintiff was entitled to receive from the defendant a kabuliat for rent at the rate which they should come to the conclusion was a fair rate, or whether his suit should be dismissed. The award therefore ought to be upheld.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J.—The plaintiff, who is the respondent in this Court, brought this suit for a kabuliat against the defendant, appellant, in the Court of the Deputy Collector of Chatra, in the Manbhum District, on 3rd June 1878, and on 7th August following, both plaintiff and defendant filed a joint petition before

the Deputy Collector, stating that they had agreed to refer the matters in dispute to certain arbitrators.

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These arbitrators, accordingly, delivered their award on 8th November, and it was sent in to the Deputy Collector. He, however, rejected it, as he considered that it was at variance with the decision in the case of *Gogon Manji v. Kashishwary Debi* (1), as it awarded a lower rate of rent than was claimed in the plaint. He, therefore, dismissed the suit. The lower Appellate Court, however, after discussing the legality of a reference to arbitration in a suit under Act X of 1859 (as to which he decided that such a reference could be legally made), and, finding that there were no valid objections to the proceedings of the arbitrators, reversed the decree of the Deputy Collector, and passed a decree in terms of the award.

In this Court it is contended that the reference to arbitration was null and void, as the chapter of the Civil Procedure Code relating to reference to arbitration is not applicable to suits under Act X of 1859.

It is quite true that that part of the Civil Procedure Code does not apply, and the lower Appellate Court was in error in relying upon two cases reported in the N. W. P. Reports as authorities. We have referred to those cases, and find that they are based upon an Act (No. XIV of 1863), which was only applicable to the N. W. P.

But we think that, on other grounds, we can uphold the decision of the lower Appellate Court. Irrespective of any Code of Procedure, persons are at liberty to refer any matter in dispute to arbitration, and any award made under such circumstance may be enforced by a suit brought for that purpose. It has also been held by this Court that parties, who have a suit pending in Court, may submit the subject-matter of that suit to arbitration, see *Thakoor Doss Roy v. Hurry Doss Roy* (2); and the same law has been laid down in Bombay, see *Hari-valabdas Kallliandas v. Utamchand Manekchand* (3). We see no reason why this principle should not be applied to a suit in Court under Act X of 1859. At any rate, if there was any

(1) I. L. R., 3 Calc., 498.

(2) W. R., 1864, MIA. Rul., 21.

(3) I. L. R., 4 Bom., 1.

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irregularity in the reference to arbitration at the request of both the parties, we think, on the authority of *Puna Bibee v. Khoda Buksh* (1) it is one which the respondent cannot be allowed to object to in appeal.

No valid grounds for setting aside the award of the arbitrators have been shown to us. We, therefore, affirm the decree of the lower Appellate Court, and dismiss this appeal with costs.

Appeal dismissed.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Jackson, Mr. Justice Morris, Mr. Justice Mitter, and Mr. Justice Tottenham.

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UMA SUNKER MOITRO (PLAINTIFF) v. KALI KOMUL
MOZUMDAR AND OTHERS (DEFENDANTS).*

Hindu Law—Inheritance—Adoption—Succession of adopted Son to Relatives of adoptive Mother.

According to Hindu law, an adopted son takes by inheritance from the relatives of his adoptive mother in the same way as a legitimate son.

Morun Moe Debeah v. Bejoy Krishto Gossamee (2) and *Chinnarama Kristna Ayyar v. Minatchi Ammal* (3) overruled.

THIS was a suit brought to recover possession of certain property, which, the plaintiff contended, devolved on him as the adopted son of one Hurosoondoree Debee, the property having previously belonged to her father, and after his death to her brother. The defendants denied the authority to adopt, and contended that an adopted son could not succeed to the property of his adoptive mother's father and brother.

The Subordinate Judge found the adoption to be valid

* Reference to Full Bench made by Mr. Justice Morris and Mr. Justice Prinsep, dated the 1st April 1880, in appeal from Appellate Decree, No. 1248 of 1878, against the decree of J. R. Hallett, Esq., Officiating Additional Judge of Rajshahye, dated the 31st May 1878, affirming the decree of Baboo Nundo Coomar Bose Roy Bahadur, Second Subordinate Judge of that district, dated the 20th December 1877.

(1) 22 W. R., 396.

(2) W. R., Sp. No., 121.

(3) 7 Mad. II. C. R., 245.

but decided that the plaintiff, under the Hindu law, could not inherit the property of his adoptive mother's relatives, and dismissed the plaintiff's suit.

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The plaintiff then appealed to the Additional Judge, who, for different reasons from those given by the Subordinate Judge as to the question of adoption, but agreeing with him as to the inability of the plaintiff to inherit the property, dismissed the appeal.

The plaintiff appealed to the High Court.

At the hearing, the learned Judges (MORRIS and PRINSEP, JJ.) referred the question of the plaintiff's right to inherit to a Full Bench, with the following remarks:—

“The plaintiff sues to recover certain property by right of inheritance, he being the adopted son of the sister of the deceased Mokund Nath Mozumdar.

“It is contended under the authority of the case of *Morun Voe Debenk v. Bejoy Krishto Gossamee* (1) that the plaintiff has no right of inheritance in the family of his adoptive mother. The judgment in that case was delivered by Shumbhu Nath Pundit, J., and was concurred in by Levinge and Roberts, JJ.

“On the other hand, we are referred to the case of *Puddo Kumaree Debee v. Juggut Kishore Acharjee* (2), and also to an unreported case, Special Appeal No. 1414 of 1878. In the first of these cases, Mitter, J., considered it unnecessary, and declined to consider, whether an adopted son does or does not succeed to the relatives of the adoptive mother. But Jackson and McDonell, JJ., expressed their opinion, that, ‘according to the interpretation of the Hindu law prevailing in Bengal, an adopted son takes by inheritance from the relatives on the maternal side of his father by adoption, in the same manner as a son begotten would take.’ And in the latter case, the same two learned Judges laid down the proposition broadly, that ‘the adopted son succeeds in all respects as the natural born son does, both on the maternal and paternal sides.’

“We think, therefore, that this question,—whether an adopted son takes by inheritance from the relatives of his adoptive mother—should be referred for the decision of a Full Bench.

(1) W. R., Sp. No., 121.

(2) I. L. R., 5 Calc., 615.

1880 Not only are the judgments of this Court in conflict on the
 UMA SUNKER point, but the subject is one of great importance to the Hindu
 MOITRO community."
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Baboo Sreenath Dass (with him Baboo Mohiny Mohun Roy and Baboo Gurudas Banerjee) for the appellant.—Can the adopted son of the sister of the deceased present funeral oblations to the deceased? If an adopted son is a *sapinda*, then he would be entitled to inherit. Section 3, paras. 16 & 17 of the Dattaka Chandrika lays down, that the adopted son presents oblations only to the ancestor of his adoptive mother. My contention is, that the son is the heir of the adoptive mother's relatives—Sutherland's Synopsis, head 4, p. 219. As to the status of an adopted son, see Sec. 1, v. 3, Dattaka Chandrika, and Sec. 5, v. 24. The adopted son takes the whole estate of brothers and other kinsmen if no natural son exists; see also Sec. 3, vv. 25 & 27. As to right of a sister's adopted son to inherit, see 2 Macnaghten's Hindu Law, p. 88. *Gunga Mya v. Kishen Kishore Chowdhry* (1) decides, that an adopted son is not entitled to succeed to the estate of his adoptive mother; but see the remarks on this case made in 1 Macnaghten, 78. The case of *Gunga Persad Roy v. Brijessuree Chowdhraïn* (2) is a converse case to the present, deciding that the relatives of the adoptive mother succeed to the estate of the adopted son. *Tara Mohun Bhuttacharjee v. Kripa Moyee Debia* (3) decides that an adopted son succeeds lineally and collaterally. The other side will rely on Chap. X of the Dayabhaga, s. 8, and say, that if a person does not come within the first six classes as there laid down, he can only succeed to the estate of his father. In *Puddo Kumaree Debee v. Juggut Kishore Acharjee* (4) it was held, that an adopted son falls within the first six classes mentioned in Chap. X. *Chinarama Kristna Ayyar v. Minatchi Ammal* (5) refers to the right of an adopted son to succeed to the estate of the relatives of the adoptive mother; and follows the case of *Morun Moe Debeah v. Bejoy Krishto Gossamee* (6). The case of

(1) 3 Sel. Rep., 128.

(4) I. L. R., 5 Cal., 615.

(2) S. D. A., 1859, p. 1091.

(5) 7 Mad. H. C. R., 245

(3) 9 W. R., 423.

(6) W. R., Sp. No., 121.

Sham Kuar v. Gaya Din (1) decides the point I am arguing for in my favor. According to Menu an adopted son is included in the first six classes, and that being so, whatever right a natural son has, the adopted son has also. As to succession of an adopted son *ex parte maternâ*, see Mayne's Hindu Law, 136—144.

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Baboo *Mohiny Mohun Roy* on the same side.—Section 6, vv. 50 to 56 of the *Dattaka Chandrika* lays down that the rule regarding the paternal is equally applicable to the maternal grandsire of an adopted son. The adopted son succeeds to the estate of a *sapinda* kinsman, and if he is a *sapinda*, we are entitled to succeed.

Baboo *Gopal Lall Mitter* (with him Baboo *Hem Chunder Banerjee* and Baboo *Gopal Chunder Sircar*) for the respondents.—The highest position given to an adopted son is that given in the *Mitakshara*, Chap. IX, v. 158:—"Although an adopted son may form one of the first six classes enumerated in Menu, yet he is not to have the same advantages as a natural son." In Chap. IX, vv. 185-187, cognates are not mentioned. All the persons mentioned are members of the same family—*Mitakshara*, Chap. XI, s. 1, p. 14. [GARTH, C.J.—What is there to show that the principle of the text you have just read does not apply to an adopted son?] He is not a blood relation. Chapter XI, s. 6 of the *Dayabhaga* treats of blood relations, and paras. 27 and 28 go to show that a father's daughter's son cannot mean father's daughter's adopted son. *Mitakshara*, Chap. II, s. 11, p. 9; Mayne on Hindu Law and Usage, p. 135; *Dayabagha*, Chap. X, pp. 7 & 8; and 1 *Strange*, p. 95, were also referred to.

The following judgments were delivered by the Full Bench:—

MITTER, J.—I think that the question referred to us should be answered in the affirmative. An adopted son, according to Hindu law, takes by inheritance from the relatives of his adoptive mother in the same way as a legitimate son.

According to Hindu law, an adopted son occupies the same position, and has the same rights and privileges in the

1880 family of the adopter as the legitimate son, except in a few
 UMA SUNKER specified instances, which have been clearly and carefully
 MOITRO noted and defined by writers on the subject of adoption.
 r.
 KALI KOMUL The theory of adoption depends upon the principle of a com-
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 he is born, both in respect to the paternal and the mater-
 nal line, and his complete substitution into the adopter's family,
 as if he were born in it.

Nanda Pandita, in the Dattaka Mimansa, Sec. VI, paras. 50, 51, and 52, after laying down that the ancestors of the adoptive mother are the maternal ancestors of the adopted son, on the authority of certain Rishis mentioned therein, in para. 53, supports that opinion thus upon general grounds:—
 “And this even is proper. The adopted son, as substitute for the legitimate son, being the agent of rites performed by a legitimate son, it follows that he is the performer of funeral repasts, the objects of which are the manes in honor of whom a legitimate son performs such repast. For without difference relation to the father and the other sires of the adopter obtains.” The original of this passage is more clear upon this point. A more faithful translation of it would be as follows:—“For without difference relation to the father's family, &c., obtains.” The author here, quite irrespective of the chapter and verse of the Rishis whom he quotes in paras. 51 and 52, supports his position on general grounds, and says, that there is no difference between an adopted son and a legitimate son in respect of his relationship to his adoptive “father's family, &c.,” which words, evidently, according to the author, indicate his (the adopted son's) relationship to the ancestors of the adoptive mother.

The cases in which there is a difference, are all accurately defined both in the Dattaka Chandrika and the Dattaka Mimansa. It would not have been necessary to define accurately the points of difference, if in all other respects the position of an adopted son had not been exactly similar to that of a legitimate son.

Apart from the general ground, there is a clear and express text in the Dattaka Mimansa, which is cited below,

showing that a child, after adoption, is not only completely severed from his own father's family, but also from his own maternal grandfather's family; and that he, by substitution, becomes connected with his adoptive father and mother's family, as if they were his natural parents: "The forefathers of the adoptive mother only are also the maternal grandsires of sons given, and the rest, for the rule regarding the paternal is equally applicable to the maternal grandsires (of adopted sons)"—Dattaka Mimamsa, Sec. VI, page 50.

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This case is governed by the authorities of the Bengal school, and it is now settled that the law of inheritance in this school is based substantially upon the theory of spiritual benefits. See the Full Bench case of *Guru Gobind Shaha Mandal v. Anand Lal Ghose Mozumdar* (1).

There is abundant authority, both in the Dattaka Chandrika and the Dattaka Mimamsa, to establish that an adopted son confers on the father of the adoptive mother the same spiritual benefit which a legitimate son does. Speaking of the *Parvana* rite (the rite which is chiefly taken into consideration on the question of spiritual benefit), the author of the Dattaka Chandrika, in para. 17, Sec. III, says:—"But the absolutely adopted son presents oblations to the father and the other ancestors of his adoptive mother only."

On this subject the author of the Dattaka Mimamsa says:—"As for what is said by Hemadri, that the precept enjoining the performance of a funeral repast, in honor of the maternal grandfather, refers to the natural maternal grandfather; that is inaccurate, for it is at variance with the passage—'of him who has given away his son, the obsequies fail.' Nor is the capacity of the maternal grandsires as givers wanting, for by reason of their affording their assent to the gift (as appears from this passage, having 'convened his kindred, &c.') they also are parties to the same. Besides, by this passage—the funeral cake follows the family and estate—the family and estate are declared to be the cause of performing the funeral repast; and the estate of the maternal grandfather also, like that of the father, lapses

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from the son given. His incapacity to perform a funeral repast in honor of his original maternal grandfather is properly declared"—Dattaka Mimansa, Sec. VI, p. 51. "Accordingly Hemadri himself, from not being satisfied with that (just stated), has advanced the other position. 'In the same manner, as for the secondary father, a funeral repast must be performed in honor of the secondary maternal grandfather, and the rest'"—Dattaka Mimansa, Sec. VI, para. 52.

It is, therefore, clear that the adopted son confers the same spiritual benefit upon the relatives of his adoptive mother as a legitimate son does, and that he is cut off from the inheritance of the relatives of his original mother. That being so, it would accord with the dictates of natural justice, as well as with the principles upon which the law of inheritance in the Bengal school is based, to hold, that an adopted son succeeds to the property of the relatives of his adoptive mother in the same way as a legitimate son.

In para. 51, Sec. VI of the Dattaka Mimansa quoted above, Nanda Pandita, citing the text of Menu—"the funeral cake follows the family and estate," says,—“that the family and estate are declared to be the cause of performing the funeral repast;” and he argues from it “that the estate of the maternal grandfather also, like that of the father, lapses from the son given.” Exactly the same process of reasoning leads to the conclusion that the adopted son, losing his right of inheritance in the family of his original father and maternal grandfather, acquires similar rights in the family of his adoptive father and maternal grandfather, because the family estate is declared to be the cause of performing the funeral repast. The adopted son is, as shown above, bound to perform the funeral repast in honor of the manes of his adoptive mother's ancestors. Therefore, the cause of this obligation, viz., the right to inherit their estate, must follow.

In the Dattaka Chandrika, the right of the adopted son to take by inheritance from the relatives of his adoptive mother is declared in clear words. After referring to certain contradictory texts of the ancient Rishis upon this subject, the author proceeds to reconcile them thus :—

“In the same manner the doctrine of one holy saint, that the son given is an heir to kinsmen, and that of another, that he is not such heir, are to be reconciled by referring to the distinction of his being endued with good qualities or otherwise. By reason of succeeding to the estate of *sapinda* kinsmen, as well as to that of the father, he is (argued by the one to be) heir to kinsmen: and on account of the particle ‘only’ in the phrase ‘of the father only’ (occurring in the passage subjoined) from inheriting merely of the father, he is (argued by the other not to be) such heir. Of these the first six are heirs to kinsmen: the other six of the father only”—*Dattaka Chandrika*, Sec. V, para. 22. “And thus (the objection of) variation from the son given being enumerated higher and lower in the order of inheritance, and so forth by different holy saints respectively, is obviated by the distinction as to his qualities, good and bad”—*Ibid* para. 23. “Therefore by the same relationship of brother and so forth, in virtue of which the real legitimate son would succeed to the estate of a brother or other kinsmen, where such son may not exist, (the adopted son) takes the whole estate even”—*Ibid*, para. 24. The words “other kinsmen” in para. 24 clearly indicate *sapinda* kinsmen, because in para. 22 the author expressly says, that, “by reason of succeeding to the estate of *sapinda* kinsmen, as well as to that of the father, he is (argued by the one to be) heir to kinsmen.”

Now, if the brother of the adoptive mother be a *sapinda* kinsman of the adopted son, then there cannot be any doubt that, according to this express authority, the latter inherits to the estate of the former.

According to the author of the *Dayabhaga*, the leading authority in the Bengal school, there cannot be any doubt that a maternal uncle is a *sapinda* of his sister's son. This is clearly laid down in para. 19, Sec. VI of Chap. XI of the *Dayabhaga*. The translation of this passage, as made by Mr. Colebrooke, with great deference to him, seems not to be strictly accurate. The correct rendering of this passage is as follows:—“Therefore a kinsman, whether sprung from the family (of the deceased), though of different male descent, as his own daughter's son or his father's daughter's son, or sprung from a

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* 1880
UMA SUNKER a different family, as his maternal uncle or the like, being allied by
MOITRO a common funeral cake (*pind*) on account of their presenting
 v. offerings to three ancestors in the paternal and the maternal
KALI KOMUL family of the deceased owner, is a *sapinda*.
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Therefore, as a legitimate son, being a *sapinda* of his maternal uncle, takes by inheritance from the latter, so does an adopted son inherit the estate of his maternal uncle by adoption, under the express words of para. 24 cited above.

But it has been contended on behalf of the respondent, that though the author of the *Dayabhaga* has, by an extension of the definition of the word *sapinda*, included in that class persons sprung from a different family and connected by a common *pind*, yet, according to its ordinary signification, as understood by the majority of the Hindu lawyers, it is limited to agnates or persons connected with the deceased through an unbroken line of male descent. It is true that many Hindu lawyers use the word *sapinda* in this restricted sense, and it seems to me that the whole strength of the case on behalf of the respondent lies in this contention. We have, therefore, to determine in what sense the word *sapinda* is used both in the *Dattaka Chandrika* as well as in the *Dattaka Mimansa*.

In Sec. I, para. 1, the author of the *Dattaka Chandrika*, after laying down, on the authority of Sanuka, "that the adoption of a son by any Brahmin must be made from among *sapindas*," says in para. 11, "that, by the use of the word *sapinda* in its general sense, it is meant from such, both of the same or a different family." Similarly, in the *Dattaka Mimansa* (Sec. XI, para. 3), the same text of Sanuka being cited, the following observation is made:—"From amongst *sapindas*," that is, amongst such kinsmen extending to the seventh degree inclusive; and the term being used in its general sense, it follows—from among such kinsmen belonging to the same or a different general family (*gotra*)—*Dattaka Mimansa*, Sec. XI, para. 3.

These passages leave no room for doubt that both the *Dattaka Chandrika* and the *Dattaka Mimansa* held that, according to the general sense of the term *sapinda*, it would include both agnates and cognates related by a common oblation.

It is clear, therefore, that, according to the authority of both these treatises on the law of adoption, which treatises have been always accepted throughout India as conclusive on questions relating to it, an adopted son takes by inheritance from the relatives of his adoptive mother.

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The learned pleaders on behalf of the respondent relied upon the authority of the Dayabhaga, and on a certain gloss of Kulluka Bhatta on a particular passage of Menu, defining the rights of an adopted son. Exactly the same contention was raised before a Division Bench of this Court in the case of *Puddo Kumaree Debee v. Juggut Kishore Acharjee* (1), where a somewhat similar question was under consideration. In my judgment in that case I have fully given my reasons for overruling it. It is, therefore, unnecessary here to repeat the same grounds.

Therefore it is clear to me, that, upon the original works on Hindu law, the weight of authority preponderates in favor of the contention that an adopted son succeeds to the estate of the relatives of his adoptive mother in the same way as a legitimate son.

Of the European text-writers, the opinion of Sir T. Strange and Mr. Sutherland are in favor of the adopted son's right. In Macnaghten's Hindu Law, page 78, Vol. I, the contrary view is expressed on the authority of the case of *Gunga Mya v. Kishen Kishore Chowdhry* (2). But this decision, as I shall presently show, is not any authority upon the point under consideration.

There are very few decided cases bearing upon the question referred to us. The earliest case upon the subject is to be found in Macnaghten's Hindu Law, Vol. II, page 88. The decision there was in favor of the right of the adopted son. In a footnote to that case, Mr. Macnaghten apparently approved of the Pundit's opinion upon which the decision was based.

The case of *Gunga Mya v. Kishen Kishore Chowdhry* (2), upon which the opinion of Mr. Macnaghten referred to above is based, is, as already stated, not a decision in point. There one of two brothers died, leaving him surviving a widow and a daughter. In respect of his share the daughter, after the death

(1) I. L. R., 5 Cal., 615.

(2) 3 Sel. Rep., 128.

1880 of the widow, sued the surviving brother, who set up a gift
 UMA SUNKER made by the widow in accordance with an alleged direction left
 MOITRO by the deceased. The daughter also alleged (most unnecessarily
 r. KALI KOMUL for the purposes of that case), that she had received from her
 MOZUMDAR. husband authority to adopt, which she had not till then exercised. One of the questions referred to the Pundit was, whether, after the death of the daughter, her adopted son, should she leave one, would succeed to the property of her father. The Pundit answered this question in the negative. But as it did not actually arise in that case, and as the right of the daughter to succeed to her father's estate was unquestionable, the Court, on finding the alleged gift not established, passed a decree in her favor without expressing any opinion on the question of the adopted son's right. Mr. Macnaghten was, therefore, mistaken in supposing that this case decided that an adopted son cannot succeed to the estate of his adoptive mother's relatives.

In *Gunga Pershad Roy v. Brijessuree Chowdhraïn* (1), the converse of the case before us arose. The question in that case was, whether the brother's son of the adoptive mother could succeed to the property left by his father's sister's adopted son. Upon the Pundit's opinion taken in that case, it was decided that he could. The case of *Gunga Mya* (2) seems to have been cited, but it was considered to be not in point.

Then comes the case of *Morun Moeë Debeah v. Bejoy Krishto Gossamee* (3), upon which the respondent's pleaders strongly rely. There the very question referred to us distinctly arose, and was decided against the right of the adopted son. The texts of the Dattaka Chandrika and the Dattaka Mimansa, extracted above, were not cited. The learned Judges were of opinion that the case of *Gunga Pershad Roy* (1) was not in point, and based their decisions mainly upon the authority of *Gunga Mya v. Kishen Kishore Chowdhry* (2). This latter decision, as already shown, is not an authority upon the point, and it seems to me that although, in *Gunga Pershad Roy v. Brijessuree Chow-*

(1) S. D. A., 1859, p. 1091.

(2) 3 Sel. Rep., 128.

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dhraïn (1), the converse question arose, that case *virtually* decided the point now under our consideration. If *A* is established to be the maternal grandfather of *B*, it follows as a matter of course that *B* is related to *A* as his daughter's son. The case of *Gunga Persad Roy v. Brijessuree Chowdhraïn* (1) in effect established that an adopted son is related to the relatives of his adoptive mother as a son actually born of her. If the relationship is established, the rights and privileges which the law of inheritance attaches to it follow as a matter of course. The learned Judges in the case of *Morun Moe Debeah v. Bejoy Krishto Gossamee* (2), (I say with due deference to their opinion), were wrong, both in relying upon *Gunga Mya v. Kishen Kishore Chowdhry* (3) in support of their decision, as well as in distinguishing the case of *Gunga Pershad Roy v. Brijessuree Chowdhraïn* (1) from the one under their consideration. The Madras High Court, in the case of *Chinnarama Kristna Ayyar v. Minatchi Ammal* (4), followed the ruling in *Morun Moe Debeah v. Bejoy Krishto Gossamee* (2), although the learned Judges who decided that case were of opinion that that ruling was opposed to the law as laid down in the *Dattaka Mimansa*. On the other hand, a Full Bench of the Allahabad High Court, in the recent case of *Sham Kuar v. Gaya Din* (5), refused to follow it, and laid down the law in favor of the adopted son's rights. These are all the cases upon the point referred to us, and it seems to me that the weight of authority preponderates in favor of the proposition that an adopted son, according to the true interpretation of the Hindu law prevailing in Bengal, takes by inheritance from the relatives of his adoptive mother.

The judgments of the lower Courts will, therefore, be reversed, and the plaintiff will be entitled to the share which he claims in the property mentioned in the plaint, with costs in all the Courts.

GARTH, C. J.—I think that the weight of authority is strongly in favor of the views expressed by my brother, Mitter, in his

(1) S. D. A., 1859, p. 1091.

(3) 3 Sel. Rep., 128.

(2) W. R., Sp. No., 121.

(4) 7 Mad. H. C. R., 245.

(5) I. L. R., 1 All., 255.

1880 learned and exhaustive judgment; and I have great satisfaction
 UMA SUNKER in answering the question referred to us in conformity with
 MOITRO what appears to me the manifest justice of the case.
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APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice.

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BRAJESHWARE PESHIKAR (PLAINTIFF) v. BUDIHANUDDI AND
 ANOTHER (DEFENDANTS).*

*Onus probandi—Mortgage-Bond—Proof of Execution and Bona fides of
 Transaction—Evidence—Recital in Instrument.*

Where a claim is made under an alleged mortgage against a *bonâ fide* purchaser for value, and the defendant puts in issue the genuineness of the transaction, the onus is upon the plaintiff of proving *primâ facie* the *bona fides*, as well as the actual execution, of the mortgage; and if the Court discredits the plaintiff's witnesses as regards the *bona fides* of the transaction, it is at liberty to dismiss the suit, although the defendant gives no substantial evidence of fraud.

A recital in a deed or other instrument is in some cases conclusive, and in all cases evidence as against the parties who make it, and it is of more or less weight or more or less conclusive against them according to circumstances. It is a statement deliberately made by those parties, which, like any other statement, is always evidence against the persons who make it. But it is no more evidence as against third persons than any other statement would be.

Chowdry Dely Persad v. Chowdry Dowlut Singh (1) explained.

Rudhanath Banerjee v. Jodoonath Singh (2) doubted.

THIS was a case referred to GARTH, C. J., as a third Judge, under s. 575 of the Civil Procedure Code, the two Judges who heard the special appeal having differed on a point of law. The facts sufficiently appear from the judgments.

* Appeal from Appellate Decree, No. 1786 of 1878, against the decree of H. C. Sutherland, Esq., Judge of Backergunge, dated the 16th August 1878, reversing the decree of Baboo Bugwan Chunder Sein, Subordinate Judge of that district, dated the 13th of May 1878.

Baboo Umbica Churn Bose for the appellant.

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Baboo Kali Mohun Dass and *Baboo Bhoobun Mohun Dass*
for the respondents.

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JACKSON, J.—In this case I have the misfortune to differ in opinion from my learned colleague, and as the difference relates to a point of law, the appeal will have to be referred, under s. 575 of the Code of Civil Procedure, to one or more of the other Judges of the Court. My view of the case is this: The plaintiff, who is described as peshakar, which, I take it, means a woman of ill-fame, sues to recover the sum of Rs. 625 as principal, and Rs. 406-10 annas as interest, amounting in all to Rs. 1,031-10 annas, by the sale,—firstly, of certain property which she alleges to have been mortgaged to her in a registered instrument by the defendant Hur Soonduri as collateral security, and which property has since been conveyed by Hur Soonduri to the other defendant Budhanuddi Chowdhry, who appears to be in possession of the same.

Hur Soonduri, the alleged borrower and mortgagor, put in no written statement, but she was examined as a witness in the cause on the plaintiff's side.

The plaintiff put in the instrument of mortgage, which purported to have been executed on the part of Hur Soonduri by one Nobin Chunder, who is admitted to be her son, and who appears to have acted under a general power of attorney on her behalf. The mortgage-bond was registered, and it recites the payment of the advance of Rs. 625 in full.

Hur Soonduri fully acknowledged, when examined as a witness, the payment of the money, and swore that she had mortgaged the property to the plaintiff. Nobin Chunder appears to have been cited both by the plaintiff and the defendant as a witness; at all events, a summons on the side of the defendant was shown to us, and appears to have been served, and it is also shown that the plaintiff applied for and obtained from the Court an order for the prosecution of Nobin on account of his failure to attend upon summons.

It may be taken as admitted that the second defendant did

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receive a conveyance of this property as from Hur Soonduri, and that conveyance, it appears, was also executed by the same Nobin Chunder, who likewise received the money.

In the written statement, which was put in by the Chowdhry defendant, he broadly asserted that the plaintiff's claim was wholly false, and that the bond upon which she relied was collusive and fraudulent; that there had been no payment or receipt of money under the bond, and that Nobin Chunder had got the bond executed *beforehand* for fraudulent purposes. He then set out the fact of his own purchase, and recited certain other mortgages previously made by Hur Soonduri, which debts, he said, had been paid off with the money taken from him. He urged that he had no notice of the alleged mortgage; that he had purchased the property in consequence of its being situated near his own house, and for that reason had paid a higher price than the market-value for it; and in conclusion he made certain allegations regarding an intrigue between Hur Soonduri's son, Nobin, and a person called Soudaminée, whose mother, he said, the plaintiff was.

I observe with great regret, regard being had to the circumstances of the case, that the Subordinate Judge should have permitted this written statement, containing most important allegations, and in the last paragraph containing statements of a scandalous nature, to be filed by the defendant under the verification of the *mokhtear*; and this fact becomes the more significant, when we see that this defendant in the sequel has abstained from coming into the witness box and giving an account of the facts within his knowledge relating to the purchase of this property.

The defendant does not say that the intrigue between Nobin and Soudaminée commenced before, or that his knowledge of that intrigue was subsequent to, his purchase through Nobin's agency.

Now, at the trial of this case, it seems that the plaintiff swore to the execution of this instrument and to the advance of Rs. 625. The defendant Hur Soonduri also deposed to the like effect, and the witnesses, three in number, speak to the execution of the bond and the passing of consideration.

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It seems to me clear on general principles, and on the authority of the judgment of the Privy Council in *Chowdry Deby Persad v. Chowdry Dowlut Sing* (1), and with reference to the case of *Radhanath Banerjee v. Jodoonath Singh* (2), decided by Mr. Justice Markby and myself, that, under such circumstances, the plaintiff having put in a duly executed and registered mortgage-deed, containing a recital of payments, having also sworn herself to the payment of the money,—and her testimony I do not find has been anywhere discredited—it lay upon the defendant, who pleaded that the mortgage was *malâ fide*, to prove such *malâ fides*. The Subordinate Judge appears to have disbelieved Hur Soonduri for some reason or other. He appears also to have given little credit to the witnesses who gave formal proof of the execution of the mortgage-deed and the passing of the consideration, but he says nothing of the testimony of the plaintiff herself. He remarks upon the absence of Nobin Chunder; but, on the authority of the cases to which I have referred, he considers, as I do, that it lay upon the defendant to give proof of the *malâ fides* asserted, and he therefore felt himself bound to give judgment for the plaintiff.

The District Judge on appeal took the opposite view. His judgment is not very clear; but he says: "The question then to decide is whether on such evidence" (having previously spoken of the evidence) "it can be held that the bond was genuine, or that any consideration passed between the parties. I think it is impossible to uphold the genuineness of the bond." Now, the genuineness of the bond was not really in issue. "Even the lower Court," he goes on, "only finds on the first issue for plaintiff, relying on the rulings of the High Court and the Privy Council, but I do not think this ruling can be so interpreted. Such admissions and such recitals are only evidence when they are believed to be good. But when, as in the present instance, the lower Court discredits Hur Soonduri's evidence *in toto*, it is difficult to see how he can accept that evidence as proving the bond. I hold then that, on the Subordinate Judge's own argument, plaintiff's case cannot stand on the bond or on the plea of consideration having passed."

(1) 3 Moore's I. A., 347.

(2) 7 W. R., 441.

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Now, in order to examine how far that judgment is correct, I wish to consider what the plaintiff in this case could have done. The parties to the transaction are herself and Hur Soonduri. She has sworn that she had paid the money, and she has not been discredited. Hur Soonduri has also sworn to the like effect; but both the Judges appear to consider that she cannot be believed. But, in the first place, Hur Soonduri was a really superfluous witness, and in the next place, it is clear that the person with whom the transaction actually occurred was Nobin Chunder. The plaintiff does all she can to secure Nobin's evidence, but Nobin refuses to appear. It is clear there was no affirmative case on the other side on which the Courts below could rely, because the only witness referred to on the side of the defendant, in the judgment of the Court below, by name, is Radhanath Chuckerbutty, and he, I find, is unable on oath to deny the *bona fides* of the disputed bond. There is nothing therefore to displace the affirmative evidence given on the side of the plaintiff, and as I have already said the plaintiff herself gave her oath, and neither of the Courts says that oath is false. In that state of the case it seems to me there was no ground, no judicial basis, on which the Courts below could refuse the plaintiff a verdict. Of course, if a particular fact is in issue, and evidence is given on one side in the affirmative, and on the other side in the negative, it is open to the Court of first instance, and also to the Court of appeal, to accept the one version or the other; but here the evidence is all on one side, and where, as held by the Judicial Committee of the Privy Council, there is *prima facie* proof of the fact contained in the recital in the instrument, it appears to me that the Courts below are not justified, and the lower Appellate Court in this case, was not warranted, in throwing out the case of the plaintiff merely upon grounds of suspicion. Let us assume for a moment that the plaintiff's case was true. She has started it by her own oath. She then calls her vendor Hur Soonduri. Hur Soonduri's interest is gone. Be it the plaintiff, or be it the other defendant, who has acquired it, Hur Soonduri has none. Either she herself or her son is clearly tainted with a fraud, and under these circumstances she gives evidence in support of the plaintiff's case, but in such a manner that the Courts below refuse

to believe in its truth. Is the plaintiff to be affected by this? Is the plaintiff's true case to be thrown out because of the misconduct of Hur Soonduri or of her son? It seems to me, it clearly cannot. But if the plaintiff's case is untrue, it must be shown to be untrue by positive evidence on the side of the defendant. It starts with a *prima facie* proof. There is the solemnly registered bond which contains the recital, and on that recital the plaintiff is entitled to rely. In addition to that she has given a quantity of other evidence, and it would be extremely unjust, it seems to me, to throw out her case because of a taint in the evidence coming from the side of her vendor, who is undoubtedly affected in one direction or the other by fraud. I think, therefore, that, under the circumstances of this case, the lower Appellate Court had no judicial ground for reversing the judgment of the Court below, that judgment being given in accordance with the evidence, and in accordance with the authority of previous decisions.

I understand the difference between me and my brother McDonell to refer merely to the powers of this Court in second appeal, his view being that the question here is a mere question of fact, with which we are not capable of dealing; but it appears to me that this is a definite question of law, which may be thus concisely stated :

The plaintiff having, in the circumstances stated, given not merely *prima facie* but substantial proof of the advance of which the receipt is acknowledged on the registered instrument of mortgage, and defendant having impugned that instrument on the ground of fraud, which he does not prove, was the lower Appellate Court at liberty to dispose of plaintiff's suit on the ground that she had not completely made out the *bona fides* of her own mortgage?

MCDONELL, J.—I regret to have to differ from my learned colleague, but I think in special appeal we cannot interfere with the lower Appellate Court. In this case undeniably the bond had been executed and registered, and if the plaintiff had left the case there, the onus, under the rulings cited by my learned brother, would have been on the defendant to prove the *mala*

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1880 *files* of the bond. But the plaintiff was not satisfied to stop here. Besides showing that the bond had been executed, she adduced witnesses to prove the bond. These witnesses the Judge, for reasons given in his judgment, disbelieves; and can we say that he should have believed those witnesses, or that he has committed an error in law in disbelieving them, without ourselves reading and weighing the evidence, which we have no right to do in special appeal, more especially as it has not been shown that the lower Appellate Court has misread or misinterpreted the evidence in any way. In this view, I think that the plaintiff is not entitled to a decree, and I should therefore dismiss the appeal with costs.

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GARTH, C. J.—The learned Judges of the Division Bench (Mr. Justice Jackson and Mr. Justice McDonell) having differed in opinion upon a point of law, it has become my duty as a third Judge (under s. 575 of the Civil Procedure Code) to decide this case.

The pleaders on both sides have been asked whether they wished to argue it again; but as they have declined to do so, I proceed to decide the question from the paper-book, with the advantage of having before me the judgments of my learned brothers.

The plaintiff appears to be a woman of ill-fame, and she sues to enforce a registered mortgage-bond against the property in question, which was given to her, as she alleges, by the defendant No. 1, on the 14th of Jeit 1282 B. S. (27th of May 1875). The sum said to have been the consideration for this bond was Rupees 625, and the principal and interest due upon it amounted, when the suit was brought, to Rupees 1,031-10.

The defendant No. 1 has put in no written statement, but has given evidence in the plaintiff's favor. The defendant No. 2 is the real defendant in the suit, having purchased the property from the defendant No. 1 under a kobala, dated the 7th of Bhadro 1283 B. S. (22nd August 1876), for a sum of Rupees 4,300.

No attempt was made in the Courts below to contest the validity of the purchase by the defendant No. 2. There is no

doubt of his having honestly bought the property, and given a full price for it. The real and only question was, whether the mortgage to the plaintiff was a *bond fide* transaction, and valid as against the defendant No. 2.

The 1st issue was framed to raise this question, *viz.*—Is the bond in dispute a *bond fide* engagement or is it fraudulent ?

The way in which this question has been dealt with in the Court below, and the way in which it ought to be dealt with as a matter of law, has formed the main ground of the difference of opinion between the Court below and the two learned Judges of this Court.

The Court of first instance found that the bond was duly executed and registered ; and the bond itself contained a recital, that the consideration-money was duly paid. The Subordinate Judge appears to have considered, not only that there were circumstances which induced a grave suspicion as to the *bona fides* of the bond, but he mentions several facts, which, as it seems to me, ought to have weighed very strongly upon the mind of any reasonable man in deciding whether the transaction was a real and honest one.

One of these is, that Nobin, the son of the defendant No. 1, who is said to have acted for her under a power of attorney in the execution of the bond and carrying out the transaction, was not called as a witness. His absence was certainly a very pregnant circumstance. He had not only acted for his mother in this and other matters of business, but he also notably acted for her in effecting the sale to the defendant No. 2. At the time of that sale a list of the mortgages upon this very property was given by Nobin to the defendant No. 2, in which the mortgage in question did not appear. Nobin, therefore, when the honesty of the transaction was called in question, was an all-important witness. If the money was really paid, he was the person who received it. If the transaction was *bond fide*, he could have proved it to be so ; and he was probably the only person who could and should have explained the fact that the mortgage in question was not entered in the list of mortgages given to the defendant No. 2.

Moreover, the Subordinate Judge finds, that Nobin was a lover

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of the plaintiff's daughter, and had been seen at the plaintiff's house since the institution of the suit; and again, he is shown to have been named as a legatee under her will. Nobin, therefore, ought, undoubtedly, to have been called as a witness for the plaintiff, and Nobin did not make his appearance. But his mother, the defendant No. 1, was examined, and the Subordinate Judge says, that from the very tenor of her deposition, she spoke of *what she had been taught to speak for the benefit of the plaintiff*, and displayed utter ignorance or loss of memory on many other points, upon which she was cross-examined. He evidently considers, that she had been tutored by Nobin, and that her evidence was unreliable.

From these and other circumstances which he mentions, the Subordinate Judge seems to have felt great doubt as to the *bona fides* of the transaction. But he found for the plaintiff apparently upon this ground:—The execution and due registration of the bond was proved, and the bond contained a recital, that the consideration-money had been paid by the mortgagee to the mortgagor. This recital—according to two rulings of the Privy Council and this Court, *Chowdry Deby Persad v. Chowdry Dowlut Sing* (1) and *Radhanath Banerjee v. Jodoonath Sing* (2)—the Subordinate Judge considered to be *prima facie* evidence of the money having been really paid, and coupled with the evidence of execution and registration, he thought it established a *prima facie* case for the plaintiff, and as the defendant had given no counter-evidence of fraud to rebut this *prima facie* case, he considered himself bound (more especially having regard to the above rulings) to find for the plaintiff.

The District Judge took a different view. He considered, that as the *bona fides* of the bond was questioned, the onus of proving that it was a valid transaction as against the defendant No. 2, lay upon the plaintiff, and taking the whole of the plaintiff's evidence into consideration, he found that little or no weight ought to be attached to the recital in the bond; and he dismissed the suit upon the ground that the bond not being a *bona fide* transaction was void as against the defendant No. 2.

In this Court, Mr. Justice Jackson has approved of the view

(1) 3 Moore's I. A., 347.

(2) 7 W. R., 441.

taken by the Court of first instance, considering that as the plaintiff had made out a *prima facie* case, which the defendant had not disproved, the lower Appellate Court was bound to give judgment for the plaintiff. On the other hand, Mr. Justice McDonell thought the question to be one of fact, which it was open to the Court below to decide as it did, and that this Court had no right to interfere with the lower Court's decision.

It appears to me, that the first question for consideration in point of law is, on whom the onus of proof lay; and I think that, having regard to the case on both sides, and to the form of the first issue, the onus of proving *prima facie* that the transaction was valid as against the defendant No. 2 lay upon the plaintiff.

The due execution of the bond is one thing, the *bona fides* and validity of it as against subsequent purchasers is another. But when, as in this case, the defendant puts the plaintiff to proof of the validity of the bond generally as against him (the defendant No. 2,) the plaintiff is bound to prove *prima facie* both the due execution of the bond and the *bona fides* of the transaction.

But then it is said, that the execution being proved, the *bona fides* is also proved *prima facie* by the plaintiff's own evidence as well as by the recital in the bond; and great weight has been attached (in deference to the authorities above cited) to the recital.

But it seems to me that the effect of the recital, as well as the decision of the Privy Council in *Chowdry Deby Persad v. Chowdry Dowlat Singh* (1), has been misunderstood.

A recital in a deed or other instrument is no doubt in some cases conclusive, and in all cases evidence, as against the parties who make it; and it is of more or less weight, or more or less conclusive, against them according to circumstances. It is a statement deliberately made by those parties, which, like any other statement, is always evidence against the persons who make it. But it is no more evidence as against third persons, than any other statement would be.

Now, in the Privy Council judgment referred to, the question

(1) 3 Moore's I. A., 347.

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arose with regard to a recital made in a ruffanama, or deed of compromise, that a particular sum of money, which was the consideration for the compromise, had been paid by one of the parties to the other; and the question whether that sum had really been paid, was raised in the suit *as between the parties to the instrument*. It was contended that the recital was conclusive evidence of payment, but it was held by the Privy Council that though not conclusive, it was undoubtedly some evidence of the payment, but evidence which might be explained and rebutted; and it was accordingly proved and decided in that case, that the payment had not been made.

In the case of *Radhanath Bunerjee v. Jodoonath Singh* (1), the facts are not very accurately stated. It may be, that there were circumstances which made the recital evidence in that case, but it would certainly seem that the recital was admitted in evidence as against third parties, who were in no way privy to the deed; and if so, the propriety of the decision seems to me extremely doubtful.

In this case, the only way in which, as far as I can see, the recital in the bond could possibly be made evidence against the defendant No. 2, was this: He no doubt claimed under the defendant No. 1, and he claimed the very property which was professedly mortgaged by his vendor, consequently the recital was a statement made with reference to that property by the person under whom he claimed, and therefore it was admissible in evidence as against him.

But then, in a case of this kind, the weight to be attributed to the recital would depend entirely upon the other evidence of the *bona fides* of the bond. If the plaintiff's evidence did not satisfy the Court that the transaction itself was honest and *bona fide*, the fact that the parties to the fraud had stated in the bond that the consideration was truly paid, would, as it seems to me, be entitled to little or to no weight.

It was contended on the part of the appellant, that if part of the plaintiff's evidence was sufficient to establish a *prima facie* case, it was incumbent upon the defendant to prove a substantive case of fraud by evidence of his own. But the answer to

this is, that though some of the plaintiff's evidence, taken by itself, might have amounted to *prima facie* proof in her favor, still looking to the whole of her evidence, and to the circumstances of the case generally, there was ample ground to justify the lower Court in disbelieving her evidence and dismissing the suit.

If it were always necessary under such circumstances for creditors and others, impeaching transactions of this kind, to give substantive evidence of fraud, they would often be placed in a hopelessly unfair position. They, generally speaking, have no means of unravelling the fraud, or of enquiring into the nature of the transaction, until they came into Court, and they are then generally driven to rely upon the skill of their counsel and the astuteness and good sense of the Judge.

In this case I consider that there were ample grounds in point of law to justify the finding of the Court below, and I therefore concur with Mr. Justice McDonell in dismissing the appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Sir Richard Garth, Kt, Chief Justice, and Mr. Justice Tottenham.

NOOR BUX KAZI AND OTHERS v. THE EMPRESS.*

Evidence Act (I of 1872), ss. 30, 138—Confession—Admission—Examination of Witnesses—Judge—Penal Code (Act XLV 1860), ss. 114, 149, and 302.

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A prisoner, charged together with others with being a member of an unlawful assembly, made a statement before the Committing Magistrate implicating his fellow prisoners and another person. He subsequently withdrew this statement, and made another, in which he endeavoured to exculpate himself.

Held, that this statement was not evidence against the other prisoners under s. 30 of the Evidence Act. It was not a confession, nor did it amount to any admission by the prisoner that he was guilty in any degree of the offence charged; but it was simply an endeavour on his part to explain his own presence on the occasion in such a manner as to exculpate himself,

* Criminal Reference, No. 39, on Appeal No. 362 of 1880, against the order of T. M. Kirkwood, Esq., Sessions Judge of Mymensing, dated the 21st May 1880.

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and any mention made by him in such a statement of other persons having been engaged in the riot, was altogether irrelevant, and not evidence against them.

At a trial before a Sessions Court, the Judge, on the examination-in-chief of the witnesses for the prosecution being finished, questioned the witnesses at considerable length upon the points to which he must have known that the cross-examination would certainly and properly be directed.

Held, that such a course of procedure was irregular, and opposed to the provisions of s. 138 of the Evidence Act.

It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in s. 138 of the Act.

FIVE persons, Jamir Mundle, Taiyab, Rabiullah, Noor Bux Kazi, and Daghu, were charged with being members of a body of men, some hundred in number, who, at the instigation of one Amiruddin Khan, on the 1st February 1880, armed with spears and clubs, went to take possession of certain lands in Mouza Kumarpur. It was alleged that one Kalu Shaikh (who was not before the Court) had speared one Kobin Sircar, who had opposed the entrance of the mob on his lands, and Jamir Mundle was charged with having struck him on the head with a *loti*, from which injuries Kobin died. It was further charged that, at the same time, Taiyab slightly wounded with a spear one Reza Mahomed, a cousin of Kobin, and that Noor Bux Kazi (unarmed) and Rabiullah, and Daghu (armed with deadly weapons) were all present at the time, as leaders of the rioters.

The four accused firstly mentioned pleaded an *alibi*. Daghu, who was arrested on the 5th February, stated before the Committing Magistrate, that he went to Kumarpur with a body of armed men, and that Kalu, Jamir Mundle, Taiyab, and Noor Bux were amongst the party. On the 24th February, before the Sessions Judge, he, however, repudiated this statement and said, that he was forced to accompany the other armed men, but that he only did so as far as Husbendi (a place adjoining Kumarpur), where he escaped, and that he did not see Noor Bux, Rabiullah or Jamir Mundle, as he did not go to Kumarpur.

The Sessions Judge, differing from the assessors, found that

Noor Bux, Jamir Mundle, and Taiyab “were members of an unlawful assembly in the prosecution of a common object, in which murder was committed by Kalu, which offence they knew to be likely to be committed, and the commission of which offence they, being present, actually abetted;” and that they had, therefore, committed an offence under ss. 114 and 149, read with s. 302, of the Penal Code. But concurring with one assessor, he found that Daghu and Rabiullah were guilty of rioting armed with deadly weapons, and had committed an offence under s. 148 of the Penal Code.

He, therefore, sentenced the two latter to three years’ rigorous imprisonment, and the three former to death.

The case was referred to the High Court in the usual way for confirmation of the sentence of death, and Noor Bux Kazi, Jamir Mundle, and Taiyab preferred an appeal from that sentence.

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Mr. Jackson and Munshee *Serajul Islam* for the appellants.—The statement made by Daghu before the Committing Magistrate cannot be said to be a confession such as is mentioned in s. 30 of the Evidence Act. In order to implicate the prisoners Daghu must have implicated himself. This he did not do. Daghu could not be convicted on his own statement alone, neither can the prisoners on Daghu’s statement. Moreover, the statement was withdrawn at the Sessions Court. [GARTH, C. J.—It is surely evidence against them, if it amounts to a confession by him that he was a member of an unlawful assembly; it is certainly a confession that he was present with Amiruddin’s men.] To render the statement a confession under s. 30, it must appear that the confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is used—*The Queen v. Belat Ali* (1); see also *The Queen v. Mohesh Biswas* (2). There is a difference between an admission and a confession. The confession must be something on which the Court could act without further evidence. [GARTH, C. J.—If the statement is admissible for the purpose of showing that Noor Bux was present, may we not connect

(1) 10 B. L. R., 453.

(2) *Id.*, 455.

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that with the other evidence? If the Court were satisfied with the identity of the prisoners, would that not be sufficient?] The case of *Regina v. Amrita Govinda* (1) is a direct answer. It is there laid down that if an abettor of a crime is, on account of his presence at its commission, to be charged as a principal, his abetment must continue down to the time of the commission of the offence. At any time before that event he may change his mind, and withdraw from the abetment. What is the meaning to be attached to the words "the Court may take into consideration" in s. 30? There is no proof that the statement was not made behind the back of Noor Bux. It was made on the 6th February, and Noor Bux was only arrested on that day, and the witnesses for the prosecution are near relatives of the deceased. As to the case against Taiyab there is no suggestion that he was present and committed the murder. Section 149 of the Penal Code was never intended to refer to a charge of murder; see the case of *The Queen v. Sabed Ali* (2).

No one appeared for the Crown.

The judgment of the Court (GARTH, C. J., and TOTTENHAM, J.) was delivered by

GARTH, C. (J. who, after stating the facts, proceeded to deal with the evidence against each prisoner individually, and with regard to the statement made by Daghu before the Committing Magistrate as affecting Noor Bux, observed):—

The Judge also attaches some weight to what he calls the original confession made by one of the prisoners named Daghu (who has been convicted under s. 148, Penal Code) to the Committing Magistrate, in which he mentions Noor Bux Kazi as present. It is our duty to point out to the Judge that this statement of Daghu's, which we have read, is no sort of evidence against Noor Bux even under s. 30 of the Evidence Act, for it is not a confession; it does not amount to any admission by Daghu himself, that he was guilty in any degree of the offence charged; but it is simply an endeavour on his part to explain his own presence on the occasion in such a manner as to exculpate

(1) 10 Bom. H. C., 499.

(2) 11 B. L. R., 347.

himself. Any mention made by him in such a statement of other persons having been engaged in the riot, is altogether irrelevant, and is not evidence against them either under s. 30 or otherwise.

(The learned Chief Justice then went into the further evidence, and finding, with regard to Noor Bux, that there was not sufficient evidence of his having been present at all, ordered the conviction as regards him to be set aside. With respect to the other two appellants, the Chief Justice found that they were members of the unlawful assembly, but there was not sufficient evidence to show that the object of the assembly was the murder of Kobin; nor that they, as leaders of the assembly, openly incited the others to cause his death, and therefore they ought not to be found guilty of murder, but only of rioting under s. 148 of the Penal Code. The learned Chief Justice then concluded as follows):—

We think it right to point out to the Sessions Judge, that the course which he adopted in the examination of the witnesses for the prosecution was irregular, opposed to the provisions of s. 138 of the Evidence Act, and not fair to the prisoners.

We find that, on the examination-in-chief being finished, the Judge questioned almost all the witnesses at considerable length upon the very points to which he must have known that the cross-examination would certainly and properly be directed. The result of this, of course, was to render the cross-examination by the prisoner's pleaders to a great extent ineffective, by assisting the witnesses to explain away, in anticipation, the points which might have afforded proper ground for useful cross-examination.

It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in s. 138 of the Act. The Judge's power to put questions under s. 165 is certainly not intended to be used in the manner which we have had occasion to notice in the present case.

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APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Maclean.

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July 14.

ASMAN SINGH (PLAINTIFF) v. DOORGA ROY AND OTHERS
(DEFENDANTS).*

*Appeal in cases cognizable by a Small Cause Court—Civil Procedure Code
(Act X of 1877), s. 586.*

A was the proprietor of nine annas of a mouza, *B* and his family of one anna, and *C* and others of the remaining six annas. *B* and his family having occupied and enjoyed, to the exclusion of their co-shareholders, fifty-four bighas of the mouza, failed to pay any rent in respect of such occupation. *A* instituted a suit against them (making *C* and the other holders of the six-anna share defendants to the suit) to recover the sum of Rs. 412-8 as the sum justly due to him after making all proper deductions, including as well the share of the rent of the fifty-four bighas to which the six-anna shareholders were entitled, as also the share which *B* and his family were entitled to retain as proprietors of a one-anna share. *Held*, that the facts shewed an implied contract on the part of *B* and his family to pay to their co-shareholders whatever, upon taking an account, should appear to be due to them; and that, inasmuch as the total amount sought to be recovered in the suit by *A* did not exceed 500 rupees, the suit was one which might have been brought in a Small Cause Court, and therefore the plaintiff had no right of second appeal to the High Court under s. 586 of the Code of Civil Procedure.

THE plaintiff in this suit was the owner of an undivided nine annas share of mouza Ishakpore, in Pergana Mulk, in the district of Bhagalpore. The nine first defendants, who in the pleadings were styled first party defendants, were members of a joint Hindu family, and the joint owners of an undivided one-anna share in the same property. The remaining defendants, styled the second party defendants, were the joint owners of the remaining six annas share. Mouza Ishakpore comprised upwards of three hundred bighas of land, out of which the proprietors kept by mutual arrangement thirty-two bighas as

* Appeal from Appellate Decree, No. 867 of 1879, against the decree of Moulvie Hafiz Abdul Kurim Khan Bahadur, First Subordinate Judge of Bhagalpore, dated the 22nd February 1879, modifying the decree of Moulvie Mahomed Noral Hossein, Munsif of Begoosherai, dated the 19th December 1878.

khoothast in their own hands. These thirty-two bighas were apportioned between the proprietors according to their respective shares, the plaintiff taking eighteen bighas as a nine-anna shareholder, the first party defendants two bighas, and the second party defendants twelve bighas. The remainder of the mouza was let out to cultivating ryots, and the first party defendants, in addition to the two bighas kept in their hands as *khoothast* under the above arrangement, separately as between them and the nine-anna and six-anna shareholders, but jointly as among themselves, occupied and cultivated fifty-four bighas on the mouza as ordinary tenants. The plaintiff, it appeared, had, for some time, with the consent of his co-proprietors, been collecting the rents on behalf of all concerned. Previous to the institution of the present suit, the plaintiff had instituted a suit against the first party defendants, on the basis of a *wasil-bahi* account, to recover from them the rent due in respect of their occupation of the fifty-four bighas during the years 1281, 1282, 1283, and 1284 (1874—1877) and obtained a decree in the Court of first instance, which was afterwards reversed upon appeal, on the ground that the relation of landlord and tenant did not exist between the parties to the suit, and that the plaintiff was bound to frame his suit so as to claim whatever was due to him upon an account taken between him and his co-owners.

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The plaintiff, accordingly, instituted the present suit against the first party defendants, making the second party defendants also parties, and asked for a decree for the sum of Rs. 412-8, against the first party defendants, as the sum due to him, on the footing that the fair rent of the land held by them was Rs. 3 per bigha, after deducting the share of the second party defendants in respect of the occupation by them of the said fifty-four bighas of land.

The first party defendants pleaded, *inter alia*, that the rate at which the plaintiff claimed to assess rent upon the land occupied by them was excessive.

The plaintiff obtained a decree in the Court of first instance, which, on appeal, was modified, on the ground that the plaintiff had not shown that Rs. 3 per bigha was the fair rent assessable

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 DOORGA ROY. on the lands occupied by the first party defendants, and that therefore the plaintiff was only entitled to the amount which would have been due to him if those lands had been assessed at Re. 1 per bigha.

Against this decree the plaintiff appealed to the High Court.

Mr. *M. L. Sandel* for the appellant.

Baboo Chunder Madhub Ghose for the respondents.

Baboo Chunder Madhub Ghose took a preliminary objection that the suit being to recover a sum not exceeding Rs. 500, and being also of a nature cognizable in a Court of Small Causes, and there having been an appeal already, a second appeal was barred by s. 586 of Act X of 1877. Suits which are cognizable by Courts of Small Causes are defined by s. 6 of Act XI of 1865. That a suit of this description is cognizable in a Court of Small Causes has been decided in the following cases:—*Huro Mohun Roy v. Khettro Monee Dossee* (1), *Sunkur Lall Pattuck Gyawal v. Mussamut Ram Kalee Dhamin* (2), *Joogul Kishore Ray v. Rughoonath Seal* (3), and *Dyebuhee Nundun Sen v. Mudhoo Mutty Goopta* (4). In the last case, which was a suit to recover from the defendants a balance claimed to be due on account of rents of the plaintiff's zemindaries collected but not accounted for by the father of the defendants, Macpherson, J., expressed an opinion that such a suit "is none the less cognizable by the Small Cause Court, because it may have been necessary to go into the accounts of both parties to see whether the amount claimed is really due or not. Section 6 contemplates the possibility of having to examine accounts between the parties, for it says,—'the following are the suits cognizable by Courts of Small Causes, namely, claims for money due on bond or other contract, when the debt does not exceed in amount or value the sum of five hundred rupees, whether on balance of account or otherwise: the only balance of account excepted being a balance of partnership account, unless the balance shall have been struck

(1) 12 W. R., 372.

(2) 18 W. R., 104.

(3) 20 W. R., 4.

(4) I. L. R., 1 Calc., 123; S. C., 24 W. R., 478.

by the parties or their agents." See also the case of *Buldeo Sing v. Ramsurun Lall* (1).

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Mr. M. L. Sandel for the appellant distinguished the cases cited for the respondents, and contended, that none of them supported the proposition that one of several co-partners, co-owners, or co-proprietors can bring a suit in a Court of Small Causes to adjust the account between him and his co-partners, co-owners, or co-proprietors, or to recover an amount to be found due to him upon the taking or adjustment of such account. A suit for an account is not a suit which can be entertained by a Small Cause Court: *Shurrut Chunder Kur v. Ram Sunkur Surmah* (2), *Krishna Kinkur Roy v. Madhub Chunder Chuckerbutty* (3). It is submitted that the only rule to be adopted is this: a suit for an account only, a suit between partners for an account, a suit between persons who have had mutual dealings for an account, and a suit between co-owners or co-proprietors for an account, cannot be brought in a Small Cause Court; but where a defendant has entered into a *contract*, express or implied, to pay to, or to hold to the use of the plaintiff, money received by him, then a Small Cause Court may entertain the suit, notwithstanding that it may be necessary to go into an account to ascertain the exact sum due.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J.—The plaintiff seeks to recover from the first party defendants the sum of Rs. 412-8 under the following circumstances.

The plaintiff is the owner of nine annas of Mouza Ishakpore, and the defendants, first and second parties, of one anna and six annas respectively. The plaintiff is in charge of the collection of the rent of the mouza from the tenants. There are thirty-two bighas of *khoodkast* lands, which have been distributed amongst the proprietors in proportion of two bighas per anna, for which no rent is realisable.

(1) 25 W. R., 234.

(2) 10 W. R., 214.

(3) 21 W. R., 283.

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Over and above their proportionate share of the *khoodkast* lands, the defendants first party cultivated fifty-four bighas in the years 1281, 1282, 1283, and 1284. The plaintiff brought a suit, under Beng. Act VIII of 1869, to recover rent for these years on account of these lands from the defendants first party, and obtained a decree in the Court of first instance. But on appeal the suit was dismissed on the ground that there did not exist the relationship of landlord and tenant between the parties, and that its frame was misconceived, inasmuch as the plaintiff could not recover anything without an adjustment of account between the shareholders regarding the profits of the mouza. The plaintiff has, accordingly, brought this suit, alleging that, on an adjustment of accounts of the profits of the mouza, he is entitled to recover the sum claimed. This being the nature of the suit, a preliminary objection has been taken to the hearing of this second appeal, on the ground that the suit was one of a nature cognizable by a Court of Small Causes. The appellant's pleader, on the other hand, urges, first,—that a Court of Small Causes, under s. 6 of Act XI of 1865, has no jurisdiction to try a case in which accounts have to be taken; and secondly, that, under the first proviso of the section in question, such a Court is not competent to take cognizance of the present suit. Several cases have been cited in support of their respective contentions:—*Shurrut Chunder Kur v. Ram Sunkur Surmah* (1), *Huro Mohun Roy v. Khettro Monee Dossee* (2), *Sunkur Lall Pattuck Gyawal v. Mussamut Ram Kalee Dhamin* (3), *Krishna Kinkur Roy v. Madhub Chunder Chuckerbutty* (4), *Joogul Kishore Roy v. Rughoonath Seal* (5), *Dyebukee Nundun Sen v. Mudhoo Mutty Goopta* (6), and *Buldeo Sing v. Ram Surun Lall* (7).

Having regard to the provisions of s. 6, Act XI of 1865, and to the authorities cited before us, we think the preliminary objection taken must prevail. The suit is substantially one in which one of the joint owners of a mouza seeks to recover, to

(1) 10 W. R., 214.

(2) 12 W. R., 372.

(3) 18 W. R., 104.

(4) 21 W. R., 283.

(5) 20 W. R., 4.

(6) I. L. R., 1 Cal., 123; S. C.,
24 W. R., 478.

(7) 25 W. R., 234.

the extent of his share, profits of the mouza from a co-sharer, who has appropriated the same in excess of his own share. Such a claim as this is evidently based upon an implied contract which exists between the joint owners of a zemindary or other landed property, and by which one co-sharer binds himself to make good to the others any profits which he may have appropriated in excess of his own proper share : *Sunkur Lall Pattuck Gyawal v. Mussamut Ram Kalee Dhamin* (1).

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The contention that a Court of Small Causes is not competent to take cognizance of any case in which an account is to be taken is, we think, untenable. If it were valid, there would have been no necessity for the proviso upon which the learned pleader for the appellant relies in the alternative. See also *Dyebuhee Nundun Sen v. Mudhoo Mutty Goopta* (2). We are also of opinion that the present suit cannot be considered to be "on a balance of partnership account," in the sense in which these words have been used in the first proviso of s. 6 of Act XI of 1865. The word "partnership" here, it seems to us, refers to the relation which subsists between certain persons as defined in s. 239 of the Contract Act. The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Morris and Mr. Justice Prinsep.

MOKUNDO LALL ROY (DEFENDANT) v. BYKUNT NATH ROY
(PLAINTIFF).*

1880
Sept. 10.

Hindu Law—Inheritance—Adopted Son.

An adopted son is not precluded from inheriting the estate of one related lineally, although at a distance of more than three generations from the common ancestor.

* Appeal from Appellate Decree, No. 539 of 1879, against the decree of T. T. Allen, Esq., Judge of Rajshahye, dated the 17th December 1878, confirming the decree of Baboo Koyelash Chunder Mookerjee, Subordinate Judge of that district, dated the 11th September 1878.

(1) 18 W. R., 104.

(2) I. L. R., 1 Calc., 123; S. C., 24 W. R., 478.

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THE plaintiff, who was the adopted son of one Brojo Nath Roy, sued to recover possession of certain properties as heir of one Gour Kishore Roy. It appeared that Brojo Nath's father was the third cousin of Gour Kishore Roy.

Baboo *Sreenath Dass* and Baboo *Gurudas Banerjee* for the appellant.

Baboo *Mohiny Mohun Roy* and Baboo *Rush Behary Ghose* for the respondent.

The judgment of the Court (MORRIS and PRINSEP, JJ.) was delivered by

PRINSEP, J.—The only point raised by the defendant, special appellant before us, is, that, by reason of his being an adopted, and not a naturally begotten, son of Brojo Nath Roy, the plaintiff is no heir to Gour Kishore under Hindu law, an adopted son not being recognized as a *sakulya* or *samanodaka*, nor is entitled to inherit if he be not a *sapinda* or related within three degrees from the common ancestor.

The general principle is very clearly laid down in the *Dattaka Mimansa*, s. 6, para 53 :—

“Without difference, relation to the father and other sires of the adopter obtains in the same manner as relation to the general family, the family deity, and family rules of that person ; the term ‘son’ is used without restriction in these and other passages.”

Unless, therefore, we found some authority clearly restricting the rights of inheritance on the part of an adopted son, and declaring that they are something less than those of the naturally begotten son, we certainly should make no distinction between them. There is a distinction declared by Hindu law where a naturally begotten son inherits jointly with a son previously adopted, but we can find no express authority for limiting the rights of an adopted son to inherit to the estate of one related lineally by more than three generations from the common ancestor. The point seems never to have been raised before in our Courts, but we observe that the judgment of this Court in the case of *Taru Mohun Bhattacharjee v.*

Kripa Moyee Debea (1) admits the rights of an adopted son to one more distantly related to him. 1880

We, therefore, dismiss the appeal with costs (2).

Appeal dismissed.

MOKUND
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v.
BYKUNT
NAUTH ROY.

Before Mr. Justice White and Mr. Justice Field.

MUTTY RAM SAHOO (DEFENDANT) v. MOHI LALL ROY (PLAINTIFF).* 1880
Sept. 13.

Jurisdiction—Right of Way—How far finding of Magistrate thereon binding on Civil Court—Code of Criminal Procedure (Act X of 1872), ss. 521, 523, 530—Estoppel.

A Civil Court is not competent to set aside the order of a Magistrate made under s. 521 of the Code of Criminal Procedure, on the ground that such order was made without jurisdiction because the land in respect of which the order was made is private property, and not a thoroughfare or public place. A Civil Court can, however, irrespective of an order made under s. 521 by a Magistrate, try the question, whether the land which formed the subject of such order is private property, and not a thoroughfare or public place, as between the parties to such suit and those who claim under them.

Per FIELD, J.—A person who, on receipt of an order made by a Magistrate under s. 521 of the Code of Criminal Procedure, declaring the existence of a right of way over such person's lands, demands, under s. 523 of the same Code, the appointment of a jury to try whether such order was reasonable, is not by such action estopped from afterwards bringing a suit in a Civil Court, seeking to establish his right to the exclusive enjoyment of the same lands.

THIS was a suit in which the plaintiff sought for a declaration of his right to the exclusive enjoyment of two plots of land. In respect of the first plot, the plaintiff alleged that it was homestead land, which had long been in his exclusive possession; that the defendant, by falsely claiming a right of way over the said plot, had obtained an order to that effect from the Magistrate

* Appeal from Appellate Decree, No. 1585 of 1879, against the decree of Baboo Sreenath Roy, Subordinate Judge of Hooghly, dated the 26th May 1879, affirming the decree of Baboo Sashibhusun Mookerjee, Second Munsif of Mohisrakha, dated the 3rd June 1878.

(1) 9 W. R., 423.

(2) See *Raghubanand Dass v. Sadhu Churn Dass*, I. L. R., 4 Calc., 425; *Puddo Kumaree Debee v. Juggut Kishore Acharjee*, I. L. R., 5 Calc., 615; and *Uma Sunker Moitro v. Kali Komul Mozumdar*, ante, p. 256.

1880 under s. 521 of the Code of Criminal Procedure. The plaintiff
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 MOHI LAL ROY. prayed for a decree setting aside the Magistrate's order, and for his restoration to the exclusive possession of the land in dispute. At the time of the judicial enquiry instituted by the Magistrate, it was shown in the present suit that the plaintiff had availed himself of the opportunity given him under the Criminal Procedure Code to insist upon the appointment of a jury under s. 523 of that Code to consider whether the order made by the Magistrate was a reasonable and proper order, and that the jury had confirmed the order of the Magistrate in this respect.

The Court of the first instance found on the facts that the right of way claimed by the defendant had only been exercised upon sufferance on the part of the plaintiff, and was not of sufficiently ancient date to warrant the establishment of a prescriptive right; that the claim made by the defendant was in respect of a private, not a public, right of way; and that the Magistrate therefore was acting *ultra vires* in adjudicating upon the matter at all. For this reason, the Court set aside the order of the Magistrate as made without jurisdiction, and on the facts gave the plaintiff a decree, establishing his right to the exclusive enjoyment of the lands in suit.

The Subordinate Judge, for substantially the same reasons, confirmed the decision of the lower Court.

The defendant appealed to the High Court.

Baboo *Umbika Churn Bose* and Baboo *Bhowany Churn Dutt* for the appellant.

Baboo *Joy Gobind Shome* and Baboo *Kally Churn Bonerjee* for the respondent.

The Court (WHITE and FIELD, JJ.) delivered the following judgments:—

FIELD, J.—In this case the plaintiff sued to recover possession of two plots of land. As to the second plot I see no reason to interfere with the decree of the Munsif, confirmed by the Subordinate Judge, which declares the plaintiff entitled to half this plot, and directs that the earth thrown upon such half, in

excavating defendant's tank, be removed. Clearly there is no ground of interference on second appeal.

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The main contention is in respect of plot No. 1. It appears that, in respect of this plot, the defendant made an application to the Magistrate; and the Magistrate, dealing with this application as a case under s. 521 of the Code of Criminal Procedure, made an order directing the plaintiff, who had closed a certain path over this piece of land, to remove the fence put up for the purpose of barring the right of way, and to leave the path open.

The plaintiff now substantially contends that this order of the Magistrate was made without jurisdiction, inasmuch as the path or the land over which it runs was not a thoroughfare or public place within the meaning of s. 521, Code of Criminal Procedure; and the Magistrate had therefore no power to make the order just mentioned. He further contends that the land is his private property, and that the defendant has no right of way over it. He therefore asks that the order of the Magistrate may be set aside, and that he may be declared entitled to the unobstructed possession of this plot of land.

Two questions are thus raised for decision, viz.:—(i) Is it competent to a Civil Court to set aside the Magistrate's order made under s. 521, Code of Criminal Procedure, on the ground that such order was made without jurisdiction, inasmuch as the land is private property, and not a thoroughfare or public place? (ii) Is it competent to the Civil Court, irrespective of that order, to try the question whether the land is private property, and not a thoroughfare or public place, and to make a decree accordingly, which, if the land is found to be private property, will have the effect of barring any similar order by a Magistrate hereafter? It may be observed that the order made by the Magistrate has been obeyed, and may be said to be spent. There is no suggestion that that order took the form of a perpetual injunction.

It has been contended on the part of the defendant that both these questions are concluded by the authority of the case of *Rooke v. Peari Lall Coal Co.* (1). In that case an order had been made apparently under s. 308 of the old Code of

(1) 3 B. L. R., A. C., 305; S. C., 11 W. R., 434.

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Criminal Procedure; and Jackson, J., said:—"It seems to me quite clear that the Civil Court has no jurisdiction to call directly in question the propriety of such an order. The plaintiff may have civil rights which he may possibly be enabled to enforce in other ways; but it seems to me quite clear that a Civil Court is not competent to declare a road, which has been opened by the order of the Magistrate, to be no public thoroughfare, and to direct that it be closed by the assistance of the officers of the Court." And Markby, J., said:—"In this case, however, an order has been made by the Civil Court, declaring that a road, which is claimed to be a public road, shall be stopped. That appears to me to be an order which, under any state of circumstances, the Civil Court has no power to make." I have referred to the original papers of this appeal, and I think that the question whether an order made under s. 308 of the old Code (which corresponds with s. 521 of the new Code), directing the removal of an obstruction or nuisance from a thoroughfare or public place, is conclusive as to the locus being a thoroughfare or public place, was not directly raised or decided in that case. The plaintiff there sued to have two roads closed, which he alleged that the defendant had made over his land in accordance with an order of a Magistrate. This order was, doubtless, made under s. 308 of the old Criminal Procedure Code. One of these roads was a cart-road, and the other a footpath. The Munsif raised and tried the issue whether these roads had been used by the public or not. He found substantially that the cart-road was not a public road, and the defendant had no right to use it, and that the footpath was a public thoroughfare used by the public, and defendant was, therefore, entitled to use it; and he made a decree accordingly. This decree was confirmed by the Subordinate Judge, who regarded the suit as a suit to set aside the orders of the Magistrate. In the grounds of appeal to the High Court no question was raised as to the jurisdiction of the Civil Court to entertain the suit, but at the hearing a question of jurisdiction did arise. Jackson, J., said:—"The ground of special appeal, which seems to us to arise in this case, which has not been taken in the petition of special appeal, but which we have allowed to be taken, is, that the order made by the Civil Court in this case is one which it was not

competent to make. I think the order made is clearly beyond the competency of the Civil Court. The defendant, it seems, has obtained an order from the Magistrate, which I presume was under the 308th section of the Code of Criminal Procedure, declaring the road in question to be a public thoroughfare, and ordering it to be kept open. It seems to me *quite clear that the Civil Court has no jurisdiction to call directly in question the propriety of such an order.*" The language which follows appears to embrace a broader proposition; but having regard to the facts of the case, to the view of the Subordinate Judge, and to the language just quoted, I think it clear that the suit was regarded as a suit brought for the purpose of "calling directly in question the Magistrate's order." Such a suit, no doubt, could not be entertained, if the application made to the Magistrate set forth a case within his jurisdiction under s. 308 of the old Code, and he had exercised jurisdiction accordingly. The cases of *Sham Dass v. Bhola Dass* (1) and *The Queen v. Janokeenath Bhutta-charjee* (2) show that a Magistrate is not entitled to interfere when a place is not a thoroughfare or public place, but is private ground.

It is quite possible to suppose a case in which there was a contention before the Magistrate as to whether the place was public or private. The Magistrate would have to decide this question in order to determine whether he ought or ought not to exercise jurisdiction. I take it that his *bonâ fide* decision of the point would be conclusive so far as regards an order made under s. 308 of the old, or s. 521 of the new, Code if that order were called directly in question in the Civil Court, on the ground that it was made without jurisdiction, inasmuch as the place was not a thoroughfare or public place. It may be observed that what these sections give the Magistrate jurisdiction to do is to remove an obstruction or nuisance from a thoroughfare or public place. There is no jurisdiction to declare a place to be a thoroughfare or public, unless it be incidentally, for the purpose of the order; no jurisdiction to make such a declaration, which shall be binding for the future.

In the case of *The Queen v. Bolton* (3), in which a rule for a

(1) 1 W. R., 324.

(2) 2 W. R., Cr. Rul., 36.

(3) 1 Q. B., 66.

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certiorari was made absolute, Lord Denman, C. J., said :—"Two points were made in support of the order: the *first*, that the proceedings all being regular on the face of them, and disclosing a case within the jurisdiction of the Magistrates, this Court could not look at affidavits for the purpose of impeaching their decision; the *second*, that even if those affidavits were looked at, the case would be found to be one of conflicting evidence, in which there was much to support the conclusion to which the Magistrates had come, and that this Court would not disturb that conclusion, even if it might have been disposed to have decided differently had the matter originally come before it.

"The first of these is a point of much importance, because of very general application; but the principle upon which it turns is very simple; the difficulty is always found in applying it. The case to be supposed is one like the present, in which the Legislature has trusted the original, it may be (as here) the final, jurisdiction *on the merits* to the Magistrates below; in which this Court has no jurisdiction as to the merits, either originally or on appeal. All that we can then do, when their decision is complained of, is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law. Even if their decision should upon the merits be unwise or unjust, on these grounds we cannot reverse it. So far, we believe, was not disputed; but as the inquiry is open, *ex concessis*, to see whether the case was within the jurisdiction of the Magistrates, it is contended that affidavits are receivable for the purpose of showing that they acted without jurisdiction, and this is, no doubt, true, taken literally: the Magistrates cannot, as it is often said, give themselves jurisdiction merely by their own affirmation of it. But it is obvious that this may have two senses: in the one it is true; in the other on sound principle, and on the best considered authority, it will be found untrue. Where the charge laid before the Magistrate, as stated in the information, does not amount in law to the offence over which the Statute gives him jurisdiction, his finding the party guilty by his conviction in the very terms of the Statute would not avail to give him jurisdiction. The conviction would be bad on the face of the proceedings, all being returned *

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before us. Or, if the charge being really insufficient, he had misstated it in drawing up the proceedings, so that they would appear to be regular, it would be clearly competent to the defendant to show to us by affidavits what the real charge was, and that appearing to have been insufficient, we should quash the conviction. In both these cases a charge has been presented to the Magistrate over which he had no jurisdiction; he had no right to entertain the question, or commence an inquiry into the merits, and his proceeding to a conclusion will not give him jurisdiction. But as in this latter case we cannot get at the want of jurisdiction but by affidavits, of necessity we must receive them. It will be observed, however, that here we receive them, not to show that the Magistrate has come to a wrong conclusion, but that he never ought to have begun the inquiry. In this sense, therefore, and for this purpose, it is true that affidavits are receivable.

“ But where a charge has been well laid before a Magistrate, on its face, bringing itself within his jurisdiction, he is bound to commence the inquiry: in so doing he, undoubtedly, acts within his jurisdiction; but in the course of the enquiry, evidence being offered for and against the charge, the proper, or it may be the irresistible, conclusion to be drawn may be, that the offence has not been committed, and so that the case in one sense was not within the jurisdiction. Now, to receive affidavits for the purpose of showing this, is clearly in effect to show that the Magistrate's decision was wrong if he affirms the charge, and not to show that he acted without jurisdiction: for they would admit that, in every stage of the inquiry up to the conclusion, he could not but have proceeded, and that if he had come to a different conclusion, his judgment of acquittal would have been a binding judgment, and barred another proceeding for the same offence. Upon principle, therefore, affidavits cannot be received under such circumstances. The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature; it is determinable on the commencement, not at the conclusion, of the inquiry; and affidavits, to be receivable, must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the inquiry.

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"We will cite only two authorities in support of this reasoning. The former, that of *Brittain v. Kinnaird* (1), and the admirable judgment of Richardson, J., at page 442, are too well known to make it necessary to state them at length. There, in the case of a conviction under the Bumboat Act, it was asked, shall the Magistrate, by calling a seventy-four gun ship a boat, give himself jurisdiction and preclude inquiry? The learned Judge gave the answer—'whether the vessel were a boat or no was a fact on which the Magistrate was to decide; and the fallacy lies in assuming that the *fact* which the Magistrate has to decide is that which constitutes his jurisdiction.' And it is obvious that if it were, whenever an action were brought against a Magistrate for issuing his warrant upon his conviction, in order to show his jurisdiction, without which he would have no defence, he would be bound to prove the facts on which his conviction proceeded. The second case is a recent decision in the Common Pleas of *Cave v. Mountain* (2), which we cite only for the rule, which seems to us very clearly and satisfactorily laid down by the Lord Chief Justice:—'There can be no doubt but that if a Magistrate commit a party charged before him in a case where he has no jurisdiction, he is liable to an action of trespass. But if the charge be of an offence over which, if the offence charged be true in fact, the Magistrate has jurisdiction, the Magistrate's jurisdiction cannot be made to depend upon the truth or falsehood of the facts or upon the evidence being sufficient or insufficient to establish the corpus delicti brought under investigation.' These cases were both of them actions of trespass against the Magistrate convicting, but they are authorities not on that account the less in point on the present occasion.

"We conclude, therefore, that the inquiry before us must be limited to this, whether the Magistrates had jurisdiction to inquire and determine, supposing the facts alleged in the information to be true; for it has not been contended that there was any irregularity on the face of their proceedings."

The marginal note to *Brittain v. Kinnaird* (1) is:—"In trespass against a Magistrate for taking and detaining a vessel, a conviction by the defendants under the Bumboat Act, no defect

(1) 1 Brod. & Bing., 432.

(2) 1 Man. & Gr., 257.

appearing on the face of the conviction, is conclusive evidence that the vessel in question is a boat within the meaning of the Act, and properly condemned. In an action against a Magistrate, a conviction by him, if no defect appear on the face of it, is conclusive evidence of the facts contained therein." In the judgment of Richardson, J., to which Lord Denman refers, it is said :— " Whether the vessel in question were a boat or no, was a fact on which the Magistrate was to decide. If a fact, decided as this has been, might be questioned in a civil suit, the Magistrate would never be safe in his jurisdiction. Suppose a conviction under the Game Laws for having partridges in possession, could the Magistrate, in an action of trespass, be called on to show that the bird in question was really a partridge ? and yet it might as well be urged in that case that the Magistrate had no jurisdiction unless the bird were a partridge, as it may be urged in the present case that he has none unless the machine be a boat. So in the case of a conviction for keeping dogs for the destruction of game, without being duly qualified to do so ; after the conviction had found that the offender kept a dog of that description, could he in a civil action be allowed to dispute the truth of the conviction ? In a question like the present we are not to look to the inconvenience, but the law ; but surely, if the Magistrate acts *bona fide*, and comes to his conclusion as to matters of fact according to the best of his judgment, it would be highly unjust if he were to have to defend himself in a civil action. Upon the general principle, therefore, that where a Magistrate has jurisdiction, his conviction is conclusive evidence of the facts stated in it, I think, &c., &c."

The present case is not brought against the Magistrate, who made the order under s. 521, Code of Criminal Procedure ; but I think the above cases indicate the principle applicable and the extent to which the Magistrate's declaration or finding that the place is a thoroughfare or public place is conclusive. Such declaration or finding is conclusive so far as regards any attempt to call the order itself directly in question. It appears to me, therefore, that the answer to the first question ought to be that it is not competent to the Civil Court to set aside the order of the Magistrate made under s. 521, Code of Criminal Procedure, on

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the ground that such order was made without jurisdiction, inas-
much as the land is private property, and not a thoroughfare or
public place.

The second question is, however, a very different one. The contention that because a Magistrate has made an order for the removal of an obstruction or nuisance from a certain place, and for the purpose of such order has found or declared such place to be a thoroughfare or public place, therefore those persons who appeared before the Magistrate in those proceedings are for ever concluded from saying that such place is not a thoroughfare or public place, but private ground, appears to me to be untenable. The Code of Criminal Procedure does not require the Magistrate to take evidence or to proceed according to judicial forms before declaring a place to be a thoroughfare or public place. No appeal is allowed from the Magistrate's finding. It is very right that a Magistrate should have a summary power of removing an obstruction or nuisance from what appears to him to be a thoroughfare or public place; but it would be very unreasonable, and serious consequences would ensue, if a Magistrate could, in such summary fashion, without evidence, or the form of judicial proceedings, make an order declaring valuable land to be a thoroughfare or public place, which would have the effect of a judgment *inter partes* between all persons who appeared before him. Looking at the whole scope of the Code of Criminal Procedure, I am unable to gather that such was the intention of the Legislature.

In the cases to which s. 530 relates, and which are cases of private property merely, a Magistrate can interfere only when there is a probability of a breach of the peace; and such interference is limited to declaring one of the two contending parties to be in possession, and entitled to retain possession until ousted by due course of law. The question of private right is left for the adjudication of the Civil Courts. So with respect to cases falling under s. 532.

It appears to me that the provisions of s. 521 were not intended to take away from the Civil Courts the right of deciding whether private rights exist in any particular immoveable property. The jurisdiction of the Magistrate has, for its imme-

diate objects, the removal of obstructions and nuisances from public places. In order to the exercise of this jurisdiction in particular cases, the Magistrate may have to decide summarily whether a certain piece of land is a public or a private place. But such decision of this question for an incidental purpose cannot, in my opinion, have the effect of an estoppel in another proceeding brought in the proper forum, for the purpose of obtaining an adjudication of a disputed right. This view is in accordance with a decision in *Gooroo Pershad Roy v. Proobhoo Ram Chatterjee* (1).

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If the plaintiff succeed in proving that the locus is not a thoroughfare or public place, but his private property, the Magistrate may be precluded in future (will certainly be precluded, upon any application made by the defendant in this suit), from dealing with the place under s. 521 of the Code of Criminal Procedure. But this is different from interfering with or setting aside the order already made by the Magistrate, and which has been obeyed.

It is next contended that the plaintiff in the present case, by submitting to the Magistrate's jurisdiction, and asking for a jury, has estopped himself from saying now that the place is not a thoroughfare or public place.

No doubt this is a matter which may be considered as evidence, but I think it would be going too far to say that, because, in ignorance of his rights or for other cause, he asked for a jury for the decision of the question whether the Magistrate's order was reasonable and proper, he thereby admitted that the place was a thoroughfare or public place.

It is to be observed that the decision of the question whether the place is a thoroughfare or public place does not rest with the jury. The Magistrate has in the first place to decide that question for himself. If he decides it in the affirmative, he will then proceed to take action; but if in the negative, he has no authority to act. In the majority of cases this preliminary decision of the Magistrate is not, and, as has been already observed, it is not required by law to be, based upon evidence judicially taken or recorded. The Magistrate may, and

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probably ought to, consider any objection that the place was not public or private; but he usually proceeds upon a police report, or some other information, or upon his general view of the whole matter. If the Magistrate decides to treat the place as a public place, I think the fact of the person concerned asking for a jury who shall decide the only question which the Code leaves to them, *i.e.*, whether the order for the removal of the obstruction or nuisance is reasonable and proper, cannot be treated as an admission that the place is a thoroughfare or public place.

I am, therefore, of opinion that the second question ought to be answered in the affirmative, and that it is competent to a Civil Court, irrespective of an order made under s. 521 of the Code of Criminal Procedure, to try the question whether the land which formed the subject of such order is private property, and not a thoroughfare or public place, as between the parties to such suit, and those who claim under them. In the present case I think it is clear that plot No. 1 is not a thoroughfare or public place, and that the defendant has no right of way over such plot. This has been found by both the lower Courts upon the evidence, and the finding cannot be impeached in second appeal.

I think, therefore, that we must dismiss this appeal as regards both plots; but so much of the decree of the lower Court as sets aside the order made by the Magistrate under s. 521, Code of Criminal Procedure, must be expunged.

WHITE, J.—I agree with my brother Field that although the plaintiff is not entitled in this suit, or indeed, by any proceeding in a Civil Court, to set aside the order made by the Magistrate under s. 521, yet that he is entitled to have the question tried in a civil suit as to whether the defendant has a right of way or not over the land in dispute.

There is nothing in s. 521, or the following section, relating to orders made by Magistrates under s. 521, which gives the Magistrate exclusive jurisdiction, for the purpose of determining whether a place is a thoroughfare or public place, nor is there anything in these sections from which it may be inferred that the jurisdiction of Civil Court to determine that point is ousted

Appeal dismissed.

Before Mr. Justice White and Mr. Justice Field.

IN THE MATTER OF THE PETITION OF SHEETANATH MOOKERJEE.
SHEETANATH MOOKERJEE v. PROMOTHONATH MOOKERJEE
AND ANOTHER.

1880
Aug. 25.

Certificate to collect Debts, Right to—Act XXVII of 1860—Question of Validity of alleged Adoption—Title.

A, alleging himself to be an adopted son, opposed the application for the grant of a certificate under Act XXVII of 1860 to B, who, irrespective of the alleged adoption, would be the legal lineal heir of the deceased. The Court before whom the application was made refused the grant of the certificate, on the ground that sufficient *primâ facie* evidence existed establishing the validity of the adoption. On appeal *held*, that the Appellate Court, concurring with the opinion expressed by the Court of first instance in respect of the *factum* of the adoption, would not be justified in setting aside the decision, on the ground, that such Court was wrong in entering into and deciding the question as to the validity of the adoption.

On an application for the grant of a certificate under Act XXVII of 1860, which is opposed by a party, who alleges he has a preferable title to it, the Court should adjudicate the question of title, with a view to determine which party has the preferential right to the certificate.

In this case one Sheetanath Mookerjee applied for the grant of a certificate under Act XXVII of 1860 in respect of the debts of one Umasundari Debi, deceased. The applicant was admittedly the heir to the deceased in the ordinary course of succession, but it was alleged by the guardian of one Promothonath, a minor, who appeared to oppose the application of Sheetanath, that such minor was the validly adopted son of the deceased Umasundari Debi, and on that ground no certificate could be legally granted to Sheetanath.

The Court of first instance entertained the question as to the *factum* and validity of the adoption, and being of opinion that strong *primâ facie* evidence existed as to the adoption, dismissed the application.

The petitioner appealed to the High Court.

Baboo Srinath Das (with him Baboo Hurrender Nath Mookerjee) for the appellant.—The Court below had no jurisdic-

* Appeal from Order, No. 126 of 1880, against the order of P. Dickens, Esq., Judge of Nuddea, dated the 8th March 1880.

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tion to enter into, and decide, the question of adoption. The alleged adopted son has no *locus standi* at the hearing of an application of this sort, and should not have been heard. The certificate should have been granted, as a matter of course, to the applicant, he admittedly being the legal lineal heir of the deceased. See *Kali Coomur Chatterjee v. Tara Prosunno Mookerjee* (1).

Baboo Nilmadhab Bose and Baboo Radhika Churn Mitter for the respondent.

The judgments of the Court (WHITE and FIELD, JJ.) were as follows :—

WHITE, J.—I think that the Judge, Mr. Dickens, was right in his view, both of the law and of the facts in this case.

Under Act XXVII of 1860, the Court is to determine the right to the certificate, subject to an appeal to this Court.

It appears to me, having regard both to the language and also to the authorities upon the construction of the Act, that when there are two claimants for the certificate, and they dispute between themselves as to the right to the certificate, the Judge ought to determine between those two claimants which of them has the preferential right to the certificate. So also, if one of them only claims the certificate, and the other merely opposes the grant, there is no difference made in the duty of the Judge by the fact, that the opponent alleges himself to be the adopted son of the deceased, and the claimant is the man who would be the heir of the deceased if the adoption had not been made. In the present case the certificate was applied for by the man who was the heir of the deceased failing the adoption, and its issue was opposed by the father and guardian of the adopted son, who is a minor. The Judge has held that so strong a *prima facie* case in favor of the adoption was made out, that he considered that he was entitled to refuse the application of the claimant. We see no reason to differ from the Judge.

We have been referred to the case of *Kali Coomur Chatterjee v. Tara Prosunno Mookerjee* (1) in which the following law is laid

down :—" An adopted son not being, so to say, a natural heir, and the fact being disputed, we think the Judge was warranted in refusing to enter into that investigation, and the certificate was properly given to the nephew of the deceased, who was the next heir according to the Hindu law, in the absence of any nearer kinsmen and heirs."

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That case has been cited as an authority to show why the decision appealed against before us should be reversed, but it appears to me no authority for that purpose. In the case cited, the lower Court had refused to go into the question of adoption, and the High Court considered that the Judge was warranted in so refusing.

It is one thing to say that a Judge is warranted in refusing to go into a particular question, and another thing to say, when he has gone into that question, that his order must be set aside. When a case comes before us, in which the facts are identical with those which are accepted in *Kali Coomur Chatterjee v. Tara Prosunno Mookerjee* (1), it will be necessary to consider whether the law there laid down is in accordance with the current of authorities on the subject. It is sufficient now to say that that decision does not stand in the way of our declining to interfere with Mr. Dickens's order.

The appeal is dismissed with costs.

FIELD, J.—The first ground taken in this appeal is, that the District Judge was wrong in entering into and deciding the question of the validity and factum of the alleged adoption.

I am of opinion that this objection to the decision of the lower Court cannot prevail.

The third section of Act XXVII of 1860 provides, "that the applicant, in his petition, shall set forth his title," and that the Court "shall determine the right to the certificate and grant the same accordingly." I think this language clearly shows that it is the duty of the Court to enter into the question of title, when there are contending parties, and the title of the person who bases a preferential right thereupon is not admitted between them. Until this question has been decided, I do not see how

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the Court can determine the right to the certificate, and grant the same accordingly.

It has been held in the Madras Presidency that the language of the section is not limited to heirs-at-law, and that a person, claiming under a will (to which the Succession Act is not applicable), may obtain a certificate under the Act upon proof of the title based upon the will. In the case of *Mussamut Anundee Koer v. Bachoo Sing* (1) Mr. Justice Phear observed as follows:—
“No doubt the Judge is quite right in thinking that the proceedings initiated for the purpose of obtaining a certificate under this Act, are not civil proceedings in this qualified sense,—namely, that no title is judicially determined between the parties as the result of the enquiry; still the Court is bound, under the Act, to give the certificate to the person who makes out a title; and it is for that purpose necessary, when parties are not agreed upon the facts, that the Judge should try the issues in the ordinary way by the aid of the evidence put forward by the parties.” In *In re Oodoychurn Mitter* (2), the question of title was considered in order to the grant of a certificate under the Act. In another case, *Koonj Behary Chowdry v. Gocool Chunder Chowdhry* (3), the case of *Mussamut Anundee Koer v. Bachoo Sing* (1) was quoted as an authority for the proposition, that the Judge is bound to enquire which title has been made out for the purposes of the legal requirements of the Act,—a proposition in no way controverted or dissented from, although in that particular case the application for a certificate was rejected upon other grounds, one of which was that this application was made, not really for the purpose of obtaining a certificate to collect debts, but with the object of obtaining a decision on a question of title which could be definitively determined only in a regular civil suit.

In the case now before us, the question of title was raised with immediate reference to the grant of the certificate, and as the District Judge has decided this question carefully, guarding his judgment with the observation, that it shall have effect for the purposes of the Act XXVII only, I am of opinion that his deci-

(1) 20 W. R., 476.

(2) I. L. R., 4 Calc., 411.

(3) I. L. R., 3 Calc., 616.

sion ought not to be disturbed upon the first ground taken in the petition of appeal.

On the question of fact, I think that a strong *prima facie* case was made out before the District Judge, and that the order made by him in the case is supported on the evidence.

I concur in dismissing the appeal.

Appeal dismissed.

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APPELLATE CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Maclean.

THE EMPRESS *v.* SUNKER GOPE.*

1880
Sept. 17.

Criminal Procedure Code (Act X of 1872), s. 66—Dishonestly retaining in British Territory property stolen beyond British Territory.

A Nepalese subject, having stolen cattle in Nepal, brought them into British territory, where he was arrested and sentenced to one year's rigorous imprisonment. *Held*, that he could not be tried for the theft itself, but that he might be convicted of dishonestly retaining the stolen property.

Reg. v. Lakhya Govind (1) followed.

REFERENCE to the High Court under s. 296 of the Criminal Procedure Code.

A Nepalese subject had stolen two head of cattle from the homesteads of two separate individuals in Nepal, and had brought the cattle with him into British territory, where he was arrested and sentenced by the Officiating Joint Magistrate of Mohubarri to one year's rigorous imprisonment under s. 411 of the Penal Code.

The Officiating Magistrate of Durbhangah was of opinion that the case was not cognizable in British territory, and referred the matter to the High Court.

No one appeared on the reference.

* Criminal Reference, No. 1324 of 1880, from F. H. Barrow, Esq., Officiating Magistrate of Durbhangah, dated the 31st August 1880.

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The opinion of the High Court (GARTH, C. J., and MACLEAN, J.) was as follows:—

GARTH, C. J.—We are of opinion that the conviction of Shunker Gope, for an offence under s. 411 of the Penal Code, is legal, and that we should not interfere. Shunker Gope confessed to having stolen cattle in the kingdom of Nepal, and he was found in possession of them in British territory. Section 66 of the Criminal Procedure Code, illustration (b), lays down, that “a charge of receiving or retaining stolen goods may be inquired into and tried, either in the district in which the goods were stolen or in any district in which any of them were at any time dishonestly received or retained.” Now the theft having occurred beyond British territory, the prisoner could not be tried for that offence in our Courts, see *Reg. v. Adivigadu* (1), but the present case seems to be very similar to one reported in the Indian Law Reports, *Reg. v. Lukhya Govind* (2); and therefore we think that the conviction may be sustained.

It is unnecessary for us to say anything on the question of extradition; that matter will be dealt with by the local authorities under the orders of Government.

Conviction upheld.

Before Sir Richard Garth, Kt, Chief Justice, and Mr. Justice Maclean.

1880
 Oct. 7.

IN THE MATTER OF MUTTY LALL GHOSE AND OTHERS.*

Criminal Procedure Code (Act X of 1872), ss. 471, 467, 193—Institution of Criminal Prosecution, pending Appeal in Civil Court.

If, in the course of a proceeding, either civil or criminal, a Judge or Magistrate finds clear ground for believing that either the parties to the proceeding or their witnesses have committed perjury or any other offence against public justice, he is justified in directing criminal proceedings against such person under s. 471 of the Criminal Procedure Code without any further enquiry than that which he has already held in his own Court.

* Criminal Motion, No. 19 of 1880, against the order of J. P. Grant, Esq., District Judge of Hooghly, dated the 5th August 1880.

(1) I. L. R., 1 Mad., 171.

(2) I. L. R., 1 Bom., 50.

As a matter of discretion and propriety, it is right for a Court, before committing a person on a charge of perjury upon his own uncontradicted statement, to await the hearing of the appeal, where an appeal is pending, in the case in which he is charged with such perjury.

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IN this case the District Judge of Hooghly ordered a prosecution to be instituted against Mutty Lall Ghose, Ram Kumar Mundle, Becharam Roy, and Heroo Lal Ghose for forgery and perjury in a civil suit, under ss. 467, 471, 193 of the Criminal Procedure Code.

An application was made to the High Court on behalf of the accused, that the criminal proceedings might be stopped until the appeal in the civil suit was heard.

Baboo *Juggut Chunder Banerjee*, for the petitioner, contended that the order of the District Judge should be set aside, or at least stayed, and that the Judge should have issued a rule calling on the petitioners to show cause why they should not be prosecuted under s. 471, before the proceedings were actually instituted.—*The Queen v. Baijoo Lall* (1).

The judgment of the Court (GARTH, C. J., and MACLEAN, J.) was delivered by

GARTH, C. J.—We think that there is no ground either for setting aside or for staying the criminal proceedings.

We consider that the Full Bench decision of this Court in *In the matter of the Petition of Ram Prasud Huzra* (2) is a direct authority for the position, that where criminal proceedings have been instituted by a District Judge against the parties or their witnesses in course of a civil suit, the High Court has no power to stay those proceedings until the decision of the Judge in the civil suit has been heard upon appeal.

As regards the other point, we think that the ruling of the Court in the case of *The Queen v. Baijoo Lall* (1) has been somewhat misunderstood. It seems to be supposed from that ruling, that a Court, either civil or criminal, which has heard a case tried, has no right to institute proceedings under

(1) I. L. R., 1 Calc., 450.

(2) B. L. R., Sup. Vol., 426; S. C., 5 W. R., Mis., 24.

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s. 471 of the Criminal Procedure Code against any of the parties concerned in the suit, without first holding an enquiry, and calling upon those parties to show cause why such proceedings should not be taken.

We think that this is clearly a mistake. If, in the course of a proceeding, either civil or criminal, a Judge or Magistrate finds clear ground for believing that either the parties to the proceeding or their witnesses have committed perjury, or any other offence against public justice, he is justified in directing criminal proceedings against such persons under s. 471, without any further enquiry than that which he has already held in his own Court.

Mr. Justice Macpherson in that very case says distinctly, "If in the course of the civil trial the Judge has before him clear and unmistakable proof of a criminal offence, and if, after the trial is over, he, on consideration, thinks it necessary to proceed at once, of course it may be right to do so."

There is, therefore, no ground, as far as we can see, for setting aside the proceedings in this case, upon the ground that the Judge should, before instituting them, have held any other enquiry than that which he had already held in the probate case.

At the same time we think that the Judge might well take warning from the very excellent advice which is given to Subordinate Courts by Mr. Justice Macpherson in the judgment which we have been quoting. We do not pretend of course to give any opinion as to the merits of this case, but it would certainly seem rather rash to institute criminal proceedings in a case where the evidence is all one way, and where an appeal is now pending to this Court. We think that, as a matter of discretion and propriety, the Judge might have waited until the appeal had been heard before he ventured to commit the accused for perjury upon their own uncontradicted statements.

Application dismissed.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

GOBIND LALL SEAL AND OTHERS (PLAINTIFFS) v. DEBENDRONATH
MULLICK AND OTHERS (DEFENDANTS).

1880
Aug. 11.

*Limitation Act (XV of 1877), sched. ii, arts. 142 and 144—Possession—
Permissive Occupation—Discontinuance.*

A suit for the recovery of immoveable property against a person who had originally been in mere permissive occupation or possession accorded on the ground of charity or relationship, is governed by Act XV of 1877, sched. ii, cl. 144, and not by cl. 142 of the same schedule.

In such a case the owner of the property, who has accorded the permissive occupation, cannot be said to have "discontinued" the possession.

THIS was an appeal from a decision of Mr. Justice Wilson, dismissing the plaintiffs' suit with costs. The facts of the case are set out in the judgment of the Court below, which will be found reported in the Indian Law Reports, 5 Calc., 679.

The *Advocate-General* (Mr. G. C. Paul), the *Standing Counsel* (Mr. J. D. Bell), and Mr. Phillips for the appellants.

Mr. Kennedy and Mr. Henderson for the respondents.

The *Standing Counsel*.—The learned Judge was wrong in holding that there was a discontinuance of possession in this case. The evidence is conclusive that the occupation was only permissive, inasmuch as the Seals repaired the house, paid the rates and taxes, and registered themselves as proprietors under the Registration Act of 1876. These acts are the strongest evidence of permissive occupation. The possession of the defendants was, admittedly, permissive at the commencement. It lies on them to show that its character has changed: *Ramdhun Satra v. Nobin Chunder Chowdhry* (1). A tenancy-at-will must be determined by notice to quit—*Phillips v. Nund Coomar Banerjee* (2), *Ram Narain Manjhee v. Mussamut Futema Sogra* (3); or by some act on the tenant's part showing a desire to hold adversely:

(1) 12 W. R., 250.

(2) 8 W. R., 385.

(3) 23 W. R., 399.

1880 *Khuruckdharee Singh v. Rewat Lall Singh* (1). Here there is no
 BIND LALL evidence of that kind except the bare omission to pay rent, and
 SEAY. that cannot constitute adverse possession: *Troylukho Tarinee*
 DEBENDRO- *Dassia v. Mohima Chunder Muttuck* (2), and *K. v. Collett* (3).
 NATH
 MULLICK. The case of *Radhabai v. Shama* (4) is clearly in point here, and
 shows the suit is not barred. *Leigh v. Jack* (5) is a very similar
 case.

Mr. *Kennedy* for the respondents.—It is not necessary to show
 adverse possession here, but merely a *discontinuance* within the
 meaning of cl. 142 of the second schedule. As to what is a dis-
 continuance, see Sugden's Vendors and Purchasers, p. 351. The
 Seals gave up this house to Shumbhoonath Mullick, and during
 the whole period of limitation ceased to have any control over it.
 They are, therefore, barred by limitation: *Jack v. Walsh* (6) and
Ellis v. Crawford (7). Even if the possession of Shumbhoo-
 nath were originally that of a tenant-at-will, that determined at
 his death, and no new tenancy has been created.

Mr. *Henderson* (on the same side) cited *Smith v. Lloyd* (8)
 and *Doe d. Bennett v. Turner* (9).

The following judgments were delivered :—

PONTIFEX, J.—There are two questions to be considered in
 this case :—1st, was the house in dispute an absolute gift from
 Mutty Lall Seal (who died in 1854) to Shumbhoonath Mullick ?
 and 2nd, if it was not an absolute gift, conveying the property,
 are the plaintiffs barred by limitation from recovering the
 house ?

With respect to the first question there is no direct or contem-
 poraneous evidence that can be relied on ; and it must, conse-
 quently, be determined by the conduct of the parties and the
 probabilities of the case.

(1) 12 W. R., 167.

(2) 7 W. R., 400.

(3) Russ. and Ry., C. C., 498.

(4) 4 Bom. H. C. Rep. A. C., 155.

(5) L. R., 5 Exch. D., 264, see

(6) 4 Ir. C. L. R., 254.

(7) 5 *Id.*, 402.

(8) 9 Exch., 562.

(9) 7 M. & W., 226 ; 9 M. & W.,

643.

p. 272 ; S. C., 49 L. J., C. P., 226.

The title-deeds of the house remained in the possession of the Seals; the property continued to stand in their names; when Beng. Act VIII of 1876 was passed, the Seals were registered as proprietors; the Seals have all along paid the rates, taxes, and assessments payable in respect of the house; the Seals have all along done the repairs when requested by the Mullicks; and when, some five or six years ago, the defendants desired a poojah-dalan to be built, on account of their turn of worship of a certain idol having arrived, the Seals furnished the materials or the greater part of the materials, though they declined, for the reasons stated by the witnesses, to build the poojah-dalan; and lastly, when in consequence of this poojah-dalan having been erected a higher assessment was placed upon the premises, the Seals paid, and continued to pay, such higher assessment. Moreover, the Seals, for many years, made a charitable allowance to the Mullicks towards their maintenance. That allowance ceased some years ago, but the payment of the rates, &c., and the execution of the repairs by the Seals have continued.

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The defendants explain these circumstances as being merely the continued bounty and charity of the Seal family; but to my mind these circumstances only convey the impression of continued acts of dominion by the Seals with respect to the property; and reflecting back on the original transaction, with respect to which we have no reliable direct evidence, they persuade me that there was never any gift of the house, but only a charitable permission to occupy it. The constant requests by the Mullicks that the Seals should execute repairs, and their application to the Seals to build a poojah-dalan, appear to me to be recognitions on the part of the Mullicks that they were occupying only by permission of the Seals.

The second question then arises:—Are the Seals now barred by limitation?

It is argued that art. 142 of the second schedule to the Limitation Act governs this case, and is conclusive in the defendants' favor. That article provides that the period of limitation for a suit for possession of immoveable property, when the plaintiff has "discontinued" the possession, shall be twelve years from the date of "discontinuance."

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If that article is to be construed so that "discontinuance" includes a permissive occupation on account of proved charity or relationship, very dangerous consequence would result in this country. For nothing is more common in a Hindu family than to permit members of it, having no legal claim upon it, such as married daughters and their husbands, to reside in part of the family property rent-free, and without written acknowledgment.

But the use of the word "discontinued" in art. 142 of the second schedule to the Limitation Act has evidently been copied from the third section of 3 and 4 Will. IV, c. 27. In that Act, however, the word "discontinued" cannot be taken to apply to a tenancy-at-will or an occupation of a like nature, because the limitation applicable to a tenancy-at-will is expressly provided for by another section of that Act.

Now, though an estate exactly corresponding to an English tenancy-at-will, with its precise incidents as to endurance and determination, may not exist in India, yet a permissive occupation, which has very considerable resemblance to a tenancy-at-will, is of extremely frequent occurrence in this country in consequence of the family-habits and natures of its people.

I think, therefore, that as section 3 of the English Act does not apply to a tenancy-at-will, so it was not intended that the corresponding art. 142 of the second schedule to the Indian Act should apply to a permissive interest in India.

I am of opinion that a permissive possession or occupation accorded on the ground of proved charity (as in the present case) or relationship, was intended and must be held to be governed by art. 144, and not by art. 142 of the Limitation Act; and, therefore, that limitation should operate in such cases from the time when possession first became adverse. And in this case the evidence shows that the possession never became adverse.

I am unable to construe "discontinuance" in art. 142 as an active putting into possession by the owner, of some dependant, by way of charity.

But even if art. 142 were applicable to cases of this nature, I am of opinion that it would not apply to the present case.

As Lord Justice Bramwell said in *Leigh v. Jack* (1):—"After all it is a question of fact, and the smallest act would be sufficient to show that there was no discontinuance." In the present case the repeated acts of entry by the Seals for the purpose of executing repairs, indicate a continuance of dominion and ownership; and the continued applications and requests by the Mullicks to the Seals seem to me, as Chief Justice Cockburn says, in the case quoted, acts of persons who did not intend to be trespassers or to infringe upon another's rights. Upon the evidence, as it stands, therefore, I think, the plaintiffs are entitled to recover, and that the judgment of the lower Court should be overruled.

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GARTH, C. J.—I quite concur in this judgment; and I only desire to add, that I think the words "dispossession" and "discontinuance" (which are borrowed from the English Limitation Act of William the IVth) apply only to cases where the owner of land has, either by his own act, or that of another, been deprived altogether of his dominion over the land itself, or the receipt of its profits.

But where the owner, in the exercise of his own proprietary right, permits some other person to occupy his land, or to receive his rents, then, whether the relation of landlord and tenant exists between the parties or not, I consider that the possession of the owner is not discontinued, because, under such circumstances, the possession of the occupier is the possession of the owner.

The case then comes under art. 139 of the Limitation Act, if the relation between the parties is that of landlord and tenant; or under art. 144, if there is no such relation; and in either case the plaintiffs in this suit are not barred.

It was contended by Mr. Kennedy for the respondents, that, assuming the possession of Sumbhoonath Mullick in the first instance to have been permissive, and that a tenancy-at-will was created in his favor, the will was determined on the death of Heeralall Seal, or at any rate on the death of Sumbhoonath Mullick; and that, upon such determination of the will, the possession of the Mullick family became adverse.

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But whether it was adverse or not, is a question to be determined by the evidence, see *Eyre v. Walsh* (1); and probably it might have been considered adverse, according to the rule of English law, if nothing had afterwards happened to show, that the Seals still retained their dominion over the property, and that the occupation of it by the Mullicks continued only permissive.

But the self-same state of circumstances which satisfies me, that the occupation by Sumbhoonath Mullick was permissive in the first instance, has continued without intermission since the death of Heeralall Seal. The rates and taxes of the house have continued to be paid by the Seals; the Seals have all along been the registered owners; they have done the repairs, when necessary; and that very remarkable piece of evidence, that the Mullicks requested the Seals to build them a dalan, and actually provided the materials for the building of it, occurred within the last five years.

We are not hampered here by the provision, which has raised so many nice points in England, under s. 5 of the Statute of William the IVth, with regard to tenancies-at-will ceasing at the end of the first year's occupancy. So long as the tenancy of the occupier does not become adverse to that of the owner, limitation does not begin to run; and an owner of land in this country seems in as favorable a position under the present Act as he was under the former Act of 1859; see *Phillips v. Nund Coomar Banerjee* (2) and *Khuruckdharee Singh v. Rewat Lall Singh* (3). I think, therefore, that the defendants' possession being permissive only, the plaintiffs are not barred by limitation, and our judgment is, that they are entitled to a decree for the property in question, with costs on scale 2 in both Courts.

Appeal allowed.

Attorneys for the appellants: Messrs. *Carruthers & Jennings*.

Attorneys for the respondents: Messrs. *Beeby and Rutter*.

(1) 10 Ir. C. L. R., 346.

(2) 8 W. R., 385.

(3) 12 W. R., 167.

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Miller.

RADHA PERSHAD MISSER (DEFENDANT) v. MONOHUR
DAS (PLAINTIFF).*

1880
Sept. 5.

*Mortgage Bond—Covenant not to lease—Lease of Property mortgaged
—Suit to set aside Lease.*

A mortgaged certain property to B, agreeing, amongst other things, not to grant in zurpeshgi or mortgage the property to any one so as to cause any difficulty in the realization of the money advanced under the mortgage-bond. A subsequently leased in zurpeshgi part of the property to C. B obtained a sale-decree against A on his mortgage, and at the sale himself became the purchaser of the property. He then brought a suit against C to set aside the zurpeshgi lease, and to obtain khas possession. Held, that the covenant in the mortgage-bond merely created a personal liability between A and B, and that the sale under B's mortgage-decree did not put an end to the zurpeshgi lease or affect the interests of the zurpeshgidar; that B's suit against C was wrong in form; and that his proper course was to sue to have his right declared to sell the property in satisfaction of his mortgage-debt, so as to give the zurpeshgidar an opportunity of redeeming.

THIS was a suit brought by one Monohur Das against Radha Pershad Misser, to set aside a zurpeshgi lease of a certain village, which had been mortgaged to the plaintiff by one Syed Zahurul Haq, and to recover khas possession of the property under mortgage.

Zahurul Haq, on the 23rd December 1867, borrowed a sum of Rs. 3,500, at 2 per cent., from the plaintiff, giving as security, amongst other properties, the village above referred to; one of the terms of the mortgage being that he, the mortgagor, "would not sell absolutely or conditionally, grant in zurpeshgi lease, or make gift of, or mortgage, the said properties to any one, or execute any deed in any way by which any difficulty might arise in the realization of the money covered by the deed."

* Appeal from Original Decree, No. 173 of 1879, against the decree of Baboo Koylash Chunder Mookerjee Roy Bahadur, Officiating Second Subordinate Judge of Tirhut, dated the 3rd April 1879.

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In July 1871 Zahurul Haq granted a zurpeshgi lease to the defendant of part of the properties included in the mortgage to the plaintiff.

On the 27th February 1873 the plaintiff brought a suit on his mortgage-bond, and obtained a decree for the sale of the mortgaged property, and at the auction-sale himself became the purchaser. The defendant, however, refused to give up possession to the plaintiff, contending that his zurpeshgi lease could not be set aside, nor he himself ousted from possession, inasmuch as he was not made a party to the mortgage-suit.

The Subordinate Judge held, that Zahurul Haq had no right to grant the zurpeshgi lease to the defendant in direct contradiction to the terms of the mortgage-bond, and that it was unnecessary that the defendant should have been made a party to the mortgage-suit, inasmuch as he had only a limited interest in the property, and did not stand in the place of his lessor. He therefore ordered the plaintiff to be put into possession of the property claimed, and set aside the defendant's ticca lease.

The defendant appealed to the High Court.

Baboo *Aubinash Chunder Banerjee* and Baboo *Hem Chunder Banerjee* for the appellant.

Baboo *Chunder Madhub Ghose* and Mr. *Sandel* for the respondent.

The judgment of the Court (GARTH, C. J., and MITTER, J.) was delivered by

GARTH, C. J.—We think that, having regard to the rule laid down by the Full Bench in *Emam Momtazooddeen Mahomed v. Rajroomar Das* (1), and to subsequent decisions of this Court, amongst which we may specially notice the cases of *Byjnath Sing v. Goberdhun Lall Mohasohree* (2) and *Cheit Narain Sing v. Gunga Pershad* (3), we cannot do otherwise than allow the appeal, and dismiss the plaintiff's suit.

It is clear that the covenant entered into by the mortgagor in the mortgage-bond of 1867 did not render invalid the zur-

(1) 14 B. L. R., 408; S. C., 23 W. R., 187.

(2) 24 W. R., 210.

(3) 25 W. R., 216.

pesghi lease which was subsequently granted. We have held in other cases that such a covenant only creates a personal liability as between the mortgagor and the mortgagee.

Then it is also clear, that the subsequent sale under the decree of 1873 did not put an end to the zurpeshgi lease, or affect the interests of the zurpeshgidar.

The plaintiff has, therefore, no right to sue for khas possession of the property as against the zurpeshgidar. His only course would be to bring a suit against the zurpeshgidar to have his right declared to sell the property to satisfy his mortgage-debt, so as to give the zurpeshgidar an opportunity of redeeming.

This suit is one of a totally different character. The plaintiff has all along contended that he is entitled to khas possession, and that the zurpeshgi lease is void; and we should be entirely changing the nature of his claim if we were to allow him to frame and try it on the other basis.

The judgment of the lower Court must, therefore, be reversed; and the plaintiff's suit dismissed with costs in both Courts.

Appeal allowed.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Pontifex, Mr. Justice Morris, Mr. Justice Miller, and Mr. Justice Prinsep.

NIAMUT KHAN AND OTHERS (PLAINTIFFS) v. PHADU BULDIA
(DEFENDANT).*

1880
Sept. 14.

Res judicata—Suit for Enhancement of Rent—Finding in Judgment not embodied in Decree—Civil Procedure Code (Act X of 1877), s. 13.

N. brought a suit against *P.* for enhancement of rent. *P.*'s defence was, *first*, that no notice of enhancement had been given; *secondly*, that the rent was not enhanceable, as he and his predecessors in title had held it at a fixed rent from the date of the Permanent Settlement. The suit was dismissed on the ground that no notice had been given; but the Munsif stated in his judg-

* Reference to a Full Bench in Appeal under s. 15 of the Letters Patent, from the decree of Mr. Justice Tottenham, dated 30th January 1880, made in appeal from appellate decree, No. 1082 of 1879, from the decree of A. T. Maclean, Esq., Judge of Zilla 24-Pargannas, dated 31st March 1879, reversing the decree of Baboo Okhoy Coomar Chatterjee, Second Munsif of Diamond Harbour, dated 23rd September 1878.

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ment, that he considered the rent enhanceable, because he did not believe in the genuineness of the documentary evidence produced by *P.* The decree merely ordered that the suit should be dismissed, the portion of the judgment as to the enhanceability of the rent not being embodied in the decree. *P.*, therefore, had no right of appeal against that portion of the judgment. In a subsequent suit by *N.*, against *P.*, for enhancement of rent of the same tenure, *Held*, that, on the rule laid down by the Privy Council in *Soorjeemonee Dayee v. Suddanund Mohapatte* (1) and *Krishna Behari Roy v. Bunwari Lall Roy* (2), *P.* was precluded, by the decision in the former suit, from denying that the rent of the tenure was enhanceable, although the decision on that point was not embodied in the decree.

The material findings in each case should be embodied in the decree, and if they are not, it is incumbent on the parties, to avoid their being bound by decisions against which they have no right of appeal, to apply to amend the decree in accordance with the judgment.

THIS case was referred to a Full Bench by GARTH, C. J., and MITTER, J., on the 1st September 1880, with the following remarks :—

“This was a suit by a landlord to enhance the rent of a tenure after notice. The defendant's case was, that he and his predecessors in title had held the tenure at a fixed rent from the time of the Permanent Settlement, and consequently that the rent was not enhanceable. The plaintiff contended that the defendant was estopped from setting up this defence, because in a former suit, No. 1193 of 1875, between the same parties, it had been decided that the rent of the tenure was enhanceable.

“Now the facts of that previous case were these :—It was a suit like the present to enhance the rent of a tenure after notice. The defence set up to it was, *firstly*, that no notice had been given; and *secondly*, that the rent could not be enhanced for the reasons alleged in the present suit. The Munsif in that case dismissed the suit upon the ground that no notice had been given; but he stated in his judgment that he considered the rent enhanceable, because he did not believe the potta and dakhilas produced by the defendant. The decree made in that suit, however, made no mention of this last point, but merely ordered that the suit should be dismissed with costs.

(1) 12 B. L. R., 304; S. C., 20 W. R., 377.

(2) 1 L. R., 1 Calc., 144; S. C., 25 W. R., 1; L. R., 2 I. A., 283.

"In the present suit the Munsif considered that the former judgment operated as a *res judicata*, precluding the defendant from denying that the rent was enhanceable. The Appellate Court, however, held otherwise, and remanded the case to the Munsif to try that question. On a second appeal to this Court the only point raised was, whether the judgment in the former suit operated as a *res judicata*, and the learned Judge held that it did not.

"An appeal was then preferred to this Court under s. 15 of the Letters Patent, and we think that the question raised is one of so much difficulty and importance, that it ought to be referred to a Full Bench.

"The learned Judge of this Court decided in favor of the defendant, upon the ground that, although in the previous suit the Munsif found that the rent was enhanceable, that finding formed no part of the decree; and as the event of the suit was in favor of the defendant upon the ground that no notice had been given, the latter had no opportunity of appealing.

"On the other hand it is contended by the appellant, that whether the finding of the Munsif was appealable or not, its effect was the same as a *res judicata*; and that although no declaration of the plaintiff's right to enhance was, in fact, made in the former suit, still, as the plaintiff would have been entitled to such a declaration if he had asked for it, the mere finding of the issue in his favor was equivalent to a declaration.

"In the case of *Sheik Enaetoolla v. Sheik Ameer Buksh* (1), decided by Markby and Mitter, JJ., the circumstances were very similar to those of the present case; and the learned Judges there held, that the finding in the former case was conclusive, although the suit was dismissed generally, and no declaration in favor of the plaintiff's right was made. This decision appears to have been based, in great measure, upon a judgment of the Privy Council in the case of *Soorjcemonee Dayjee v. Suddanund Mohapatter* (2); and see also *Krishna Behari Roy v. Bunwari Lal Roy* (3) and *Kriparam v. Bhagawan Dass* (4).

(1) 25 W. R., 225.

(3) I. L. R., 1 Cal., 144; S. C.,

(2) 12 B. L. R., 304; S. C.,

25 W. R., 1; L. R., 2 I. A., 283.

20 W. R., 377.

(4) 1 B. L. R., A. C., 68.

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"Under the provisions of the Civil Procedure Code, 1877, an appeal lies only *from the decree* of the lower Court (1) and the question seems to be whether any finding of the lower Court can be made the subject of appeal, which neither expressly, nor by implication is embodied in the decree; and if the finding of that Court is not embodied in the decree, whether it can be considered as a *res judicata* in any future suit.

"The question, therefore, which we desire to refer for the opinion of the Full Bench is, whether the decision of the learned Judge of this Court should be confirmed?"

Baboo *Mohiny Mohun Roy* for the appellants.

Baboo *Kali Mohun Dass* for the respondent.

The following judgments were delivered by the Full Bench :—

GARTH, C. J. (PONTIFEX and MITTER, JJ., concurring).—We think we are bound to follow, in its integrity, the rule which has been laid down by their Lordships of the Privy Council in the cases referred to, and adopted by the Legislature of this country in the 13th section of the new Code,—namely, that when a material question has been substantially tried and decided in a former suit, and in a competent Court, it cannot be tried again in any other suit between the same parties.

The question which is raised in this suit, namely,—whether the tenure was liable to enhancement,—was undoubtedly tried and determined by the Munsif in the former suit; and although no declaration was made of the plaintiff's right in that respect, and although the decision was not embodied in the decree, so as to give the defendant a right of appealing against it, still it was a decision within the meaning of the rule laid down by the Privy Council, and we think that the defendant is bound by it.

It was argued at the bar, that where, as in this case, the decision in the former suit became immaterial for the purposes of that suit, and the defendant (as the decree was framed), had no opportunity of appealing against it, it is hard that it should be binding upon him.

(1) See *Koylash Chunder Khosari v. Ram Lall Nag*, ante, p. 206.

There is no doubt, that the application of the rule to case like the present may, occasionally, be productive of hardship; especially until the effect of the rule is more generally understood. Parties are very naturally unwilling to appeal against adverse decisions in cases where they are in the main successful, and where, for the purposes of the suit, the appeal is unnecessary. But, nevertheless, they must appeal, unless they are content to be bound by those decisions. It is most important that suitors should understand their position in that respect; and it obviously becomes necessary, in order to give parties a proper opportunity of appealing, *that the material findings in each case should, in future, be embodied in the decree.*

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Unless the finding is thus embodied in the decree, the party against whom the issue is decided will have no right to appeal against it. Appeals can only be preferred *against the decrees, not against the judgments* of the lower Courts (see ss. 540 and 584 of the Civil Procedure Code); and therefore, if a party wishes to appeal against the decision of a particular issue, which does not appear in the decree, he must first apply to the Court to amend the decree by embodying the decision in it.

This will render it necessary for the lower Courts to draw up their decrees with much greater particularity than has hitherto been observed.

The effect of our decision in this case will be, that the judgments of this Court and of the District Judge will be set aside, and the judgment of the Munsif restored. The appellant will have his costs in all the Courts.

MORRIS, J.—In my opinion this case falls within the rule laid down by the Judicial Committee of the Privy Council in the case of *Soorjeemonee Dayee v. Suddanund Mohapatter* (1). In their judgment in that case, their Lordships say:—

“If both parties invoked the opinion of the Court upon this question, if it was raised by the pleadings and argued, their Lordships are unable to come to the conclusion that, merely because an issue was not framed, which, strictly construed, embraced the whole of it, therefore the judgment upon it was *ultra*

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vires. Their Lordships are of opinion that the term 'cause of action' (s. 2, Act VIII of 1859) is to be construed with reference rather to the substance than to the form of action. But even if this interpretation were not correct, their Lordships are of opinion that this clause in the Code of Civil Procedure would by no means prevent the operation of the general law relating to *res judicata* on the principle '*nemo debet bis vexari pro eadem causâ.*'

It is not unlikely, as has been suggested in the course of the argument, that the case before the Munsif having been dismissed, the defendant did not think it necessary to appeal against the judgment that his tenure was liable to enhancement, and was misled by the omission of that finding in the decree itself; but, to use the words of their Lordships of the Privy Council, "both parties invoked the opinion of the Court upon this question, and it was raised by the pleadings and argued." The omission of this finding in the decree is not material, because, as pointed out by Mr. Justice Markby in the case of *Sheik Enaetoolla v. Sheik Ameer Buksh* (1), their Lordships, when they delivered their judgment in the case of *Soorjeemonee Deyee* (2), had not the decree before them, and neither in that case, nor in another very similar case, *Krishna Behari Roy v. Bunwari Lal Roy* (3), did they think it necessary to have the decree before them. As a matter of fact, in neither case was the finding relied on embodied in the decree. It is true that, under s. 540 of the present Code of Civil Procedure, which corresponds with s. 23, Act XXIII of 1861 of the old Code, "unless when otherwise expressly provided in this Code, or by any other law for the time being in force, an appeal shall lie from decrees or from any part of decrees only." If, therefore, in this case the defendant desired to avoid the finding which was adverse to himself, he should have taken proper steps to have the decree amended, and so put himself in a position to appeal against it. It is a well-known practice in our Courts to give the decree, after it is drawn up and before it is signed by the Court, to the pleaders of both parties for their examination and signature. An opportunity is thus afforded them of

(1) 25 W. R., 225.

(2) 12 B. L. R., 304; S. C., 20 W. R., 377.

(3) I. L. R., 1 Cal., 144; S. C., 25 W. R., 1; L. R., 2 I. A., 283.

comparing the decree with the judgment, and of correcting the former, if necessary, where it appears to be at variance with the latter. The failure, however, on their part to avail themselves of this, and to amend the decree so as to open the door to an appeal, cannot render a finding of no effect or less binding upon the parties.

In this view, so long as the opinion of the Court has been given on a question which has been raised by the pleadings and argued, that opinion must be considered as *res judicata*, even though it may not have been embodied in the decree. I would answer the reference which has been made to this Bench accordingly.

PRINSEP, J.—I concur in the judgment delivered by Mr. Justice Morris.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Pontifex, Mr. Justice Morris, Mr. Justice Mitter, and Mr. Justice Prinsep.

KASHIKANT BHUTTACHARJI (DEFENDANT) v. ROHINIKANT
BHUTTACHARJI AND OTHERS (PLAINTIFFS).*

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1880
Sept. 6.

Limitation—Suit for Arrears of Rent—Beng. Act VIII of 1869.

The last day on which a suit for the recovery of arrears of rent can be instituted under s. 29, Beng. Act VIII of 1869, is the last day of the third year from the close of the year in which the rent became payable.

The word "arrear" in that section means "rent in arrear."

Woomesh Chunder Bose v. Surjee Kanto Roy Chowdhry (1) overruled.

THIS case was referred to a Full Bench by MORRIS and PRINSEP, JJ., with the following remarks:—

"We are called upon to decide, in this Special Appeal, whether a suit for arrears of rent of 1280, or of any portion of it, brought on the 30th Assar 1284 (corresponding with July 13, 1877) is

* Full Bench Reference in Special Appeal, No. 361 of 1879, against the decree of Baboo Nobin Chunder Ghose, First Subordinate Judge of Mymensing, dated 24th September 1878, modifying the decree of Baboo Anuntoram Ghose, Munsif of Attia, dated 31st May 1878.

(1) I. L. R., 5 Calc., 713.

1880 not barred by limitation under the terms of s. 29 of the
 KASHIKANT Beng. Rent Law (Beng. Act VIII of 1869)?
 BHUTTA-
 CHARJI "The plaintiffs' (respondents') pleader, relying on the judgment
 v. of a Division Bench of this Court in the case of *Woomesh Chunder Bose v. Surjee Kanto Roy Chowdhry* (1), at first contended,
 ROHINIKANT that the present suit, so far as it relates to rent of 1280. could
 BHUTTA- be brought at any time within 1284. But on its being pointed
 CHARJI out that, in this case, the defendant was under a contract to pay
 the rent by instalments in the months of Assar, Assin, Pous, and
 Cheyt, he admitted that this judgment did not support him so
 far as this suit related to the rent payable in the three first-
 named months; but he argues, that it is strictly applicable in
 respect of the rent payable in Cheyt.

"On reference to the judgment in question, it appears to us to be undoubtedly an authority for the proposition that a suit for the rent of Cheyt 1280 can be brought at any time before the close of 1284. But with all deference to the learned Judges who delivered that judgment, we cannot concur in the construction which they put upon the terms of s. 29 of the Rent Law.

"It appears to us that, following the construction placed both by the Courts in England and by the Imperial Legislature on terms similar to those used in s. 29, Act VIII of 1869 of the Bengal Code, a suit for a arrears of rent of the entire year 1280, or of the last instalment of that year, cannot be brought after three years calculated from the last day of 1280.

"We do not agree with the learned Judges who decided the case of *Woomesh Chunder Bose v. Surjee Kant Roy Chowdhry* (1) that the rent of 1280, supposing it to be payable in one payment, would not be due until the 1st Bysak 1281. It would, in our opinions, be due or payable on the last day of 1280,—i. e., on the last day of Cheyt of that year. The correct rule for interpreting the terms used in s. 29 seems to us to be that which is contained in the Limitation Acts of 1871 and 1877 and in cls. 2 and 3, s. 3 of the General Clauses Act (I of 1868), viz., that, in calculating limitation, or determining a particular period, the first day of that period should be excluded and the last day

(1) I. L. R., 5 Cal., 713.

included. Moreover, it has been held by the Courts in England (see Maxwell on Statutes, page 310), where the particular period was one month, that 'the day corresponding with that from which the computation began is excluded, so that two days of the same number are not comprised in it,'

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"It is true that the Acts of the Imperial Legislature to which we have referred, do not apply to the Bengal Rent Act, but there is nothing in that Rent Act which is opposed to such a construction; and in our opinion, the general principles which regulate the interpretation of expressions similar to those contained in s. 29, should be applied also to that special law. There is nothing in the Rent Law which makes it exceptional in this respect.

"In the present case, therefore, we are of opinion that limitation commenced to run from the last day of Cheyt 1280, when the instalment payable on that date became due; but that, in calculating the term of three years, that day must be excluded. A suit for that instalment could not be brought until the 1st Bysak 1281, and might be brought not later than the last day of the period of three years from the last day of Cheyt 1280, calculated according to the Gregorian era.

"This question, as affecting the period within which suits for arrears of rent may be instituted, is of great importance, and calls for immediate decision. We desire, therefore, the authoritative ruling of a Full Bench on the following point:—

"What is the last day on which a suit for the recovery of ordinary arrears of rent,—that is, rent payable yearly at the close of the year to which it relates, can be instituted under s. 29, Beng. Act VIII of 1869?"

Baboo Golap Chunder Sircar for the appellant.

Baboo Issur Chunder Chuckerbutty, *Baboo Mohiny Mohun Roy*, and *Baboo Kishory Mohun Roy* for the respondents.

The judgment of the Full Bench was delivered by

GARTH, C. J.—We think it clear that the last day on which a suit for the recovery of arrears of rent can be instituted under the section referred to, is the last day of the third year from the

1880 close of the year in which the rent became payable; and as in
 KASHIKANT, this case the rent was payable in the month of Cheyt 1280, and
 BHUTTA- the defendant was bound to pay it before the close of the last
 CHARJI day of that month, the plaintiff must have brought his suit
 v. within three years from that day.
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We do not quite understand the reasons upon which the case of *Woomesh Chunder Bose v. Surjee Kanto Roy Chowdhry* (1) proceeded. It seems to have been considered by the learned Judges in that case, that an arrear of rent does not become due until the day after that on which by the terms of the holding the rent is payable. But this, we think, is a fallacy. The rent becomes due at the last moment of the time which is allowed to the tenant for payment. If it is not paid within that time, it becomes an arrear; and continues an arrear until it is paid.

The word "arrear" in s. 29 of the Rent Act means "rent in arrear;" and that rent in arrear would, undoubtedly, become due on the last day of the year in which it is payable.

The judgment, therefore, of the lower Appellate Court will be modified by limiting the sum which the plaintiffs are entitled to recover, to the rent which became due in the years 1281 and 1282.

We think that the appellant should only have his proportionate costs of the hearing before Mr. Justice Morris and Mr. Justice Prinsep, but that he is entitled to the full costs of this hearing.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

1880
 Aug. 11.

G. M. CUTTS AND ANOTHER (DEFENDANTS) v. T. F. BROWN AND OTHERS (PLAINTIFFS).

Specific Performance—Evidence—Admissibility of Parol Evidence—Evidence Act (I of 1872) s. 92, provisoes 1 and 6—Practice—Joinder of Causes of Action—Civil Procedure Code (Act X of 1877), s. 44, rule (a)—Specific Relief Act, ss. 17, 22, 26.

The plaintiffs sued for specific performance of an agreement in writing, which set forth, *inter alia*, that the defendants had agreed to sell, &c., under "certain conditions as agreed upon." The defendants alleged, that the written agree-

ment did not contain the whole of the agreement between the parties, and offered parol evidence in support of their contention.

Held (reversing the judgment of WILSON, J.), that the parol evidence was admissible to show what was meant by the clause "certain conditions as agreed upon."

Per PONTIFEX, J. (GARTH, C. J., dissenting).—The evidence was admissible under proviso 1, s. 92 of the Evidence Act (I of 1872).

Discussion as to the meaning of s. 92 of the Evidence Act, and of ss. 17, 22, and 26 of the Specific Relief Act.

Per PONTIFEX, J.—It is of the essence of specific performance that part only of an agreement should not be performed.

Part of the purchase-money had been advanced by the plaintiffs to the defendants, for which the defendants had given their promissory notes; and the plaint contained a prayer that the defendants be ordered to pay over the amount of the notes.

Held (affirming the decision of WILSON, J.), that there was no misjoinder of causes of action within the meaning of s. 44, rule (a) of the Code of Civil Procedure (Act X of 1877).

THE plaintiffs in this case sued one George Malcolm Cutts and Roslyn Eliza, his wife, for the specific performance of an agreement for the sale of a share of a certain house. It appeared that, on the 1st of October 1877, the defendants, being under the impression that they were entitled to a third share of the house in question, entered into an agreement in writing with the plaintiffs to sell the share to them for Rs. 6,200, "under certain conditions as agreed upon." The plaint stated that, "it being subsequently discovered that the defendants had only a one-fourth share in the said house, a verbal agreement was, by consent of the plaintiffs and defendants, entered into, whereby the defendants agreed to sell their share in the said house and premises to the plaintiffs for Rs. 5,000. A portion of the purchase-money was paid by the plaintiffs. On three several occasions the defendants gave the plaintiffs promissory notes for various sums, amounting in all to Rs. 3,000, advanced by the plaintiffs to them. The plaint prayed, that the defendants might be ordered to specifically perform the agreement of the 1st October 1877, and to repay the sum of Rs. 3,000 due upon the promissory notes.

The defendant George Malcolm Cutts alone filed a written statement. He contended that, as the plaintiffs had not, previ-

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ously to the institution of the suit, obtained the leave of the Court to join his alleged cause of action in respect of the promissory notes mentioned in the plaint with his alleged cause of action in respect of the immoveable property, he was not at liberty to maintain the suit. This defendant stated that he and his wife agreed to sell the share in the house to the plaintiffs, subject to certain terms and conditions as agreed to between them, for the sum of Rs. 6,200. These terms and conditions were, that, upon the execution of the conveyance of the share by the defendants in favour of the plaintiffs, the plaintiffs should execute a lease of the share in favour of the defendants for the period of three years, at the yearly rent of Rs. 720; that the defendants should remain in occupation of the share for the period mentioned; and that, at the expiration thereof, the plaintiffs should sell back the share to the defendants for the same sum of Rs. 6,200 if they wished them to do so. The reason why these conditions were agreed upon was, the first defendant stated, that he and his wife had no intention to sell the share, but only to mortgage it; that they were advised that they had no power to mortgage; and that, therefore, the sale, lease, and re-purchase was arranged. The first defendant then stated the agreement to sell the one-fourth share for Rs. 5,000, and that the terms and conditions mentioned had not been performed; and contended that the plaintiffs were not entitled to specific performance of the agreement without themselves carrying out their part of the contract.

Mr. *Phillips* and Mr. *Trevelyan* for the plaintiffs.

Mr. *Branson* and Mr. *Bonnerjee* for the defendants.

Mr. *Phillips*. — It was not necessary to obtain the leave of the Court under s. 44, rule (a) of the Civil Procedure Code, to join the different causes of action upon which the plaintiffs rely. A suit for the specific performance of an agreement to sell a share in a house is not a "suit for the recovery of immoveable property" within the meaning of that section. Possibly this might be held to be a "suit for land or other im-

moveable property" within s. 12 of the Charter, but those words are more comprehensive than the words used in s. 44, rule (a). The defendants contend that the plaintiffs cannot obtain specific performance of the agreement until they have performed certain terms and conditions which are not stated in the agreement. Those terms and conditions would have to be proved by parol evidence, and the case of *Daimodlee Paik v. Kaim Turidar* (1) is an authority to show that parol evidence cannot be given to vary the terms of the written agreement.

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Mr. *Bonnerjee* for the defendants.—The causes of action have been wrongly joined, and the suit must be dismissed. The Court has no jurisdiction to entertain a suit in this form—*Pilcher v. Hine* (2) and *Delhi and London Bank v. Wordie* (3). Clause (c) of s. 44 can only refer to foreclosure. [WILSON, J.—Could you call a suit to compel registration a suit for land?] No, because the title passes by the conveyance. [Mr. *Phillips* called attention to Act III of 1877, s. 49, as showing that the conveyance had no effect without registration.] Then such a suit would be for the recovery of land. The plaintiffs rely upon and seek performance of a verbal agreement. There must have been some agreement for a lease. "Certain conditions as agreed upon" cannot refer to the condition in the document. These words were inserted by the defendants themselves in the draft. [WILSON, J.—Suppose you are right in saying you can give evidence of the terms you set up; is that any answer to the suit?] The transaction would not be a mortgage. The plaintiffs' agreement to re-sell is as much a part of the agreement as their paying the price. We say they must covenant to re-sell. [WILSON, J.—I suppose I may take it that the words "under certain conditions" refer to the document annexed to the plaint?] Yes.

WILSON, J.—As between the plaintiffs and Mr. *Bonnerjee's* client it appears to me that no issue of fact has to be decided.

The suit is for the specific performance of a contract for sale

(1) I. L. R., 5 Cal., 300.

(2) 24 W. R. (Eng.), 619.

(3) I. L. R., 1 Cal., 249.

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of land. The objections are two-fold. The first is an objection to procedure, the other goes to the substance of the suit.

It is said the suit cannot be entertained in its present form by reason of s. 44, rule (a) of the Civil Procedure Code. That section says:—"No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, or to obtain a declaration of title to immoveable property, except—(a) claims in respect of mesne profits or arrears of rent in respect of the property claimed; (b) damages for breach of any contract under which the property or any part thereof is held; and (c) claims by a mortgagee to enforce any of his remedies under the mortgage."

Mr. Bonnerjee has cited the case of the *Delhi and London Bank v. Wordie* (1), which probably would be sufficient to justify him in saying that this is a suit for land within the meaning of the words of the Charter. The terms of the section are narrower. It seems to me that a suit for "the recovery of immoveable property" is a suit founded upon an existing title in which the plaintiff seeks to get possession of the property itself. The words "to obtain a declaration of title to immoveable property" seem to me to apply to a case where a title exists, and the plaintiff asks to have that fact declared, not to a case where he seeks to have something done, which, when done, will give him a title.

I think the first objection of the defendants fails. If it were otherwise, I think there would be power under s. 53 to amend the plaint by striking out the part which is not properly joined.

The other ground of defence goes to the substance of the case. The defendants say the contract alleged by the plaintiffs was not the real contract; but that there were other terms which had to be fulfilled before they could obtain specific performance.

The plaint sets up a written contract for sale of a share in the premises in question, the parties assuming that the share of the female defendant was a one-third share. Accordingly, the contract was for sale of a one-third share. The plaint (para. 3) says,—“It being subsequently discovered that the defendants had only a one-fourth share in the said house, a verbal agree-

(1) I. L. R., 1 Calc., 249.

ment was by consent of the plaintiffs and defendants entered into, whereby the defendants agreed to sell their share in the said house and premises to the plaintiffs for Rs. 5,000." I think the true meaning of that paragraph is, that the written agreement for sale of the one-third share continued intact, except that when the mistake was discovered, the written agreement was varied by one-fourth being sold instead of one-third, and the price being Rs. 5,000 instead of the larger sum. And that is the view taken by the defendants themselves in their written statement.

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Then we have to come to the written document to see what the original contract was. That must be determined on the words of the document itself. The written document seems to me to be a complete contract of sale. Mr. Bonnerjee has called attention to the words "under certain terms and conditions as agreed upon." But these words do not, in my opinion, refer to anything outside the document, but to terms therein contained. They are an indication that there are conditions which are to be attended to, and the latter part of the deed sets out these terms. It would be entirely contradictory of the document if evidence were now to be given that the contract was subject to terms or conditions not set out in the document. The case of *Daimod-dee Paik v. Kaim Taridar* (1) seems to be an authority that evidence cannot be given to vary what in a case like this is expressed in the document, and I should have come to the same conclusion in the absence of such an authority.

Even if the evidence were given, it is by no means clear that the defendants have any defence to the action. It is by no means clear that the existence of such a term entitled the defendants to the covenant they suggest. A man may be entitled under a contract to have a thing done; but it does not of necessity follow that he is entitled to have a covenant about it inserted in a deed. As between the plaintiffs and the first defendant no question of fact in my opinion arises.

From this decision the defendants appealed.

Mr. Hill for the appellants.

(1) I. L. R., 5 Cal., 300.

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BROWN.Mr. *Philps* and Mr. *Trevelyan* for the respondents.

Mr. *Hill*.—Leave should have been obtained to join the cause of action on the promissory notes, as this is in reality a suit for land—*Delhi and London Bank v. Wordie* (1). The plaintiffs sue for specific performance of an agreement, which we say is not the whole agreement between the parties, and in such a case the defendant is always allowed to give parol evidence to defeat the plaintiff's suit: Specific Relief Act, s. 26; Dart on Vendors and Purchasers, p. 1039; *Marquis of Townshend v. Stangroom* (2); *Woollam v. Hearn* (3). The evidence offered does not contradict the writing, and s. 92 of the Evidence Act does not apply.

Mr. *Phillips*.—Admitting that we agreed to re-sell to the defendants at the end of three years, the defendants are not entitled to have a covenant to that effect inserted in the deed of sale. They never asked this, and it would be unreasonable to grant it now. The evidence was properly rejected, as no case of fraud was shown—*Marquis of Townshend v. Stangroom* (2) [PONTIFEX, J., referred to *Clarke v. Grant* (4).] The evidence offered would turn the writing, which appears to be an absolute sale, into a mortgage, and could not therefore be received—Evidence Act, s. 92.

Mr. *Trevelyan* on the same side.

The following judgments were delivered:—

PONTIFEX, J.—The plaintiffs in this case sue for specific performance of a written agreement by the defendants to sell a share in a house. The defendants, in their written statement, allege that, in addition to the written agreement, there was a further parol agreement, that the plaintiffs should let the property to the defendants for three years, and should give them a right to purchase at the end of the three years.

The defendants also claimed that the suit should be dismissed, because, in contravention of s. 44, rule (a) of the Procedure

(1) I. L. R., 1 Calc., 249.

(3) 7 Vesey, 211. See S. C., 2 W.

(2) 6 Vesey, 328.

and T., L. C., 481n.

(4) 14 Vesey, 519.

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Code, the plaintiffs had, without the leave of the Court, improperly joined a separate cause of action with their suit for immoveable property. But I agree with the Court below that this objection cannot prevail, because there is in fact no joinder of separate causes of action, but only a demand for alternative relief.

The written agreement which the plaintiffs seek to enforce commences its witnessing part as follows :—

“ Witnesseth that the said defendants do sell under certain conditions as agreed upon to the plaintiffs all that, &c.” The learned Judge has held that, upon the proper construction of the document, the words abovementioned only apply to the terms subsequently contained in the document itself. Probably this would be the ordinary construction ; but I think that, under proviso 6 to the 92nd section of the Evidence Act, the defendants are entitled to go into evidence to prove the contrary.

But the learned Judge has further held, that, under s. 92 of the Evidence Act, the defendants are not entitled to go into evidence to prove the case set up in their written statement, on the ground, that to allow them so to do would be to allow them to contradict, vary, add to, or subtract from the terms of the written agreements. I am, however, unable to agree with him for two reasons. In the first place, I think that the agreement set up in the written statement falls within proviso 1 to s. 92. For, if the plaintiffs really agreed verbally to the conditions alleged by the defendants, it would be a fraud on their part to insist on performance of the written agreement without at the same time securing to the defendants the performance of the other conditions which they had promised. In the words of the Masters of the Rolls, in *Clarke v. Grant* (1)—“ but for the promise there would, probably, never have been any agreement at all. It would then be against equity, and a fraud on the defendant, to insist upon his performance of an agreement which he only signed on the faith ” of certain additions.

Secondly, I think that, according to the authorities at least, the agreement set up in the written statement falls within proviso 2 to s. 92 ; that, if true, the oral agreements alleged are separate

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agreements, collateral to and not inconsistent with the terms of the written agreement, just in the same way as I think it would still be open to prove that what is ostensibly a conveyance was in fact intended to be a mortgage. The cases of *Morgan v. Griffith* (1) and *Erskine v. Adeane* (2) seem to me very strong illustrations of this proposition.

Moreover, it is of the essence of specific performance that, except under special circumstances, part only of an agreement ought not to be deemed to be performed. So strong is this influence, that it has been held that, even when the defendant does not allege a parol variation, but it comes out in the evidence, the Court will direct an enquiry in regard to it before disposing of the case—*Parken v. Whitby* (3), *London and Birmingham Railway Co. v. Winter* (4), *Helsham v. Langley* (5); and indeed the Court will direct an enquiry when the variation is alleged by the defendant, but only so far proved as to raise a suspicion of the existence, and yet not to satisfy the Court—*Van v. Corpe* (6). So careful is the Court in decreeing specific performance. The 17th section of the Specific Relief Act recognises this principle; and the 22nd section gives the Court complete discretion. Indeed, the 26th section of the Specific Relief Act was, in my opinion, enacted to meet this very case, which, as I read it, falls within cl. (e) to that section. It is true that the words “upon some stipulation on the plaintiff’s part which adds to the contract, but which he refuses to fulfil,” are not (according to the ordinary untechnical meaning of the word stipulation) very apt words to express what was intended, namely, some condition “in favor of the defendant agreed to by the plaintiff which he refuses to fulfil.” But cls. (a), (b), and (c) have been pitchforked verbatim into the Act from Mr. Dart’s book on Vendors and Purchasers, p. 1039, Edn. 5. I can but suppose that they are intended to have the same effect as Mr. Dart ascribes to them.

Upon the whole, therefore, I am of opinion that the defendants in this case ought at least to have been allowed to go into evi-

(1) L. R., 6 Exch., 70.

(2) L. R., 8 Ch. App., 756.

(3) T. and R., 366.

(4) Cr. and Ph., 57.

(5) 1 Y. and C., C. C., 175.

(6) 3 M. and K., 269.

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dence, and the case must, therefore, be returned to the lower Court for that purpose. Whether the defendants, supposing them to prove their case, will be entitled to have a power or proviso for repurchase inserted in the conveyance to the plaintiffs, is a question for the lower Court to decide. I can only express my opinion now, that if the defendants prove their case, the plaintiffs are seeking by their plaint performance of only part of an agreement, to which they are not entitled; and that they can be entitled to specific performance of the terms in their own favour of the whole agreement proved, only upon the terms in the defendants' favour being properly secured to them. If the defendants succeed in the lower Court in proving the case set up by them, they must, I think, have the costs of the appeal; otherwise the plaintiffs will be entitled to such costs. The Court below ought to deal with the costs of the original hearing in that Court.

GARTH, C. J. — I agree with my brother Pontifex upon both points, as well as in the form of the decree which he proposes to make.

But I would decide the second point, as to the admissibility of the oral evidence, upon this one ground only.

I think the defendant ought to be allowed to show, if he can, that the words in the contract "under certain conditions" refer to conditions outside the contract, and not to those contained in it. There is nothing in the contract itself to show that the conditions so referred to are those which are mentioned in it, and if the conditions were in fact made orally, and the contract was expressly made subject to those conditions, it seems clear to me that they are not inconsistent with it. It is not necessary that the whole agreement should be in writing; and if, upon the face of that part of it which is in writing, it appears that there are other conditions, oral or otherwise, which go to make up the entire contract, there is no reason why those conditions, if made orally, should not be orally proved. The rule laid down in s. 92 of the Evidence Act applies only, as I consider, where, upon the face of it, the written instrument appears to contain the whole contract.

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I quite agree with my brother Pontifex that s. 26 of the Specific Relief Act is intended to provide for just such a case as the present.

But I do not think that proviso 1 of s. 92 is applicable here. That proviso seems to me to apply to cases where evidence is admitted to show that a contract is void, or voidable, or subject to re-formation, upon the ground of fraud, duress, illegality, &c., in its inception; and not to cases where the agreement being in itself perfectly valid and free from any taint of that kind, one of the parties attempts to make a fraudulent use of it as against the other. It will be found that the rule laid down in s. 92 of the Evidence Act is taken almost verbatim from Taylor on Evidence (1st Edn.), s. 813; and the exceptions which follow in the several provisoes are discussed in ss. 816 to 841 of the same work. That being so, I think it is quite legitimate to refer to those sections, as one means of ascertaining the true meaning of the provisoes. The substance of the proviso, and the examples showing the meaning of that proviso, are contained and explained in ss. 816 to 819; and it will be found that they all relate to the reception of evidence for the purpose of invalidating contracts, by reason either of fraud, illegality, &c., in their inception, or of some subsequent failure of consideration.

For this reason, as well as from the language of the proviso itself, I think that it is not intended to apply to a case where the contract itself being valid, one of the parties wishes to make an improper use of it.

Then again, I cannot think that the additional terms relied upon by the defendants are admissible under proviso 2, as being a "separate oral agreement not inconsistent with the terms of the principal contract."

It seems to me, that an absolute sale of a property, such as the plaintiffs ask us to enforce against the defendants, is a totally different thing from a sale, which is subject in the first place to an obligation on the part of the purchaser to let the property to the vendor for three years from the time of the sale; and in the next place, to the additional obligation to re-sell to the vendor at the end of the three years at a specified price.

The interest which the purchaser would take in the one case would be a very different thing, and worth a very different price, from what he would take in the other; and I, therefore, think that the additional terms do vary and are inconsistent with the principal contract.

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The case of *Morgan v. Griffith* (1), which is referred to by my brother Pontifex, seems to me entirely different from this. In that case an action was brought by a tenant against his landlord for damage done to his land by rabbits. The lease, which was in the usual form, reserved all the game and rights of shooting to the landlord; but as the tenant, who had entered upon the property before the lease was executed, found the land competely overrun with rabbits, he refused to sign the lease, until the landlord had orally promised that he would have the rabbits destroyed. Upon this promise being made, the tenant signed the lease; but the rabbits were not destroyed, and consequently the tenant's crops were seriously injured. It was held that he had a right to sue for that damage, the oral agreement being collateral to the lease, and not inconsistent with it. The oral agreement there seems to me perfectly consistent with the landlord having all the game to himself, and the exclusive right to shoot it.

The case of *Erskine v. Adeane* (2) was very similar to *Morgan v. Griffith* (1); and the oral agreement there, so far as it was sought to be enforced against the landlord, was for the same reason, which I have explained in *Morgan v. Griffith* (1), consistent with the terms of the lease.

Subject to these observations, I agree with the judgment which has just been delivered.

Appeal allowed and case remanded.

Attorney for the appellants: Mr. H. H. Remfry.

Attorney for the respondents: Mr. Leslie.

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Maclean.

1880
June 15.

MOHESH LAL (PLAINTIFF) v. BUSUNT KUMAREE (ONE OF THE DEFENDANTS).*

Limitation Act (IX of 1871), s. 20—Acknowledgment—Repeal of Act—Revival of Right to sue—Authorized Agent—Signature—Civil Procedure Code Act (VIII of 1859), s. 4.

The law of limitation governing a suit for a debt, is that law which is in force at the date of its institution.

As far as regards debts, the Indian laws of limitation merely bar the remedy, but do not extinguish the right.

Krishna Mohun Bose v. Okhilmoni Dossee (1), *Nocoor Chunder Bose v. Kally Coomar Ghose* (2), and *Ram Chunder Ghosal v. Juggutmonmohiney Dabee* (3) overruled.

Gunga Gobind Mundul v. The Collector of the 24-Pergunnahs (4) explained.

Valia Tumburati v. Vira Rayan (5) and *Madhavan v. Achudn* (6) followed.

Acknowledgments which under Act XIV of 1859 were insufficient to keep alive a cause of action, because they were signed only by an agent, held to be sufficient to sustain a suit on the same cause of action under Act IX of 1871.

Where a series of acknowledgments of a debt have been made, each within three years of the one next preceding, and the first of the series has been made within three years of the date on which the debt was contracted, a suit for the recovery thereof is, under Act IX of 1871, in time, if instituted within three years from the date of the last acknowledgment.

Discussion as to who is an authorized agent, what is a sufficient signature, and what amounts to a sufficient acknowledgment, within the meaning of s. 20 of Act IX of 1871.

Under s. 20 of Act IX of 1871, the authorized agent may sign either his own name or that of his principal.

THIS was a suit brought on 24th September 1877 by one Mohesh Lal Sahu, a banker, to recover from the widows of one

* Appeal from Original Decree, No. 124 of 1878, against the decree of Hafez Abdul Karim, Khan Bahadur, First Subordinate Judge of Bhagalpore, dated the 6th March 1878.

(1) I. L. R., 3 Calc., 333.

(2) I. L. R., 1 Calc., 328.

(3) I. L. R., 4 Calc., 283.

(4) 11 Moore's I. A., 345.

(5) I. L. R., 1 Mad., 228.

(6) *Id.*, 301.

Kali Pershad Singh (whose estates came under the charge of the Court of Wards in August 1877) sums amounting to Rs. 59,286, being money advanced to Kali Pershad, and, after his death in Assar 1281, to his widow, with interest on such sums, to enable them to make payment of the Government revenue and rents of Kali Pershad's estate as they became due.

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The plaintiff stated, that both Kali Pershad, and, after his death, his widows, had received advances from him; and that, at the end of each year, an account was drawn up and entered in the books of the ensuing year, but the signatures to such accounts were affixed at intervals extending over several years, Kali Pershad having affixed his signature to such accounts in Assin 1271, and in Assin 1274, on which date he had admitted a sum of Rs. 13,611-2-6 to be due up to the end of the commercial year 1274; and that, after his death, Sampat Koeri, one of his widows, on 13th Bhadro 1282 F. (30th August 1875), signed the account on behalf of herself and the other widow, and according to that account Rs. 36,797 was then due to the plaintiff up to the end of the commercial year 1281; that further advances were made up to 1284, but no accounts had since been signed. The plaintiff further relied on certain letters said to have been written at the instance of Sampat Koeri, by the hand of her agents, as acknowledgments of the debt due, and as such renewing their liability to pay the sums sued for, all which letters, except the two following, are sufficiently set out in the judgment of Maclean, J. Those relied on which are not there set out were, one dated 28th Bhador 1281, written by one Shital Lal, a dewan of Sampat Koer:—

“To Baboo Mohesh Lal—Compliments of the Debi of Lagwan I request that you will be kind enough to cause the Government revenue to be paid; after the Dashera I will send you the malguzari; after the vacation I will settle the previous account.”

And one dated 16th Assar 1283, written by Shital Lal to Mohesh Lal Sahu:—

“Compliments of Sampat Koeri to Baboo Mohesh Lal Sahu. You have sent to realize the money, but nothing has been settled regarding the dispute arisen amongst ourselves, hence the delay

1880 in paying the money. But after settlement is made with you
 MOHESH LAL I will pay all your money."

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Neither of these letters were, however, signed by Shital Lall.

The Court of Wards, on behalf of the defendants, did not dispute the sum of Rs. 13,611-2-6 admitted by Kali Pershad; but contended that no such accounts as were mentioned had been ever shown to explained to, or signed by Sampat Koeri; that, even admitting they were so signed, the signature of Sampat Koeri could not bind Banjiet Koeri (the other widow); that the letters put forward were not such an acknowledgment of the debt alleged to be due as would, under Act IX of 1871, revive the debt due from Kali Pershad; and that all sums, including the sum admitted by Kali Pershad, remaining unpaid up to within three years from the date of suit, were barred by limitation.

The Subordinate Judge found that it had not been satisfactorily proved that Sampat Koeri had signed the accounts in 1875, and that the letters put forward were not signed by either of the widows; and that, therefore, all sums claimed as being due previous to three years from the date of the institution of the suit were barred by limitation; but gave a decree for Rs. 9,334, with interest at 6 per cent. on the sums claimed after that date.

The plaintiff appealed to the High Court.

Mr. Phillips' (Baboo Mohesh Chunder Chowdhry and Baboo Abinash Chunder Banerjee with him) for the appellant.—The account stated was signed on 30th August 1875, and the suit was brought in September 1877. Sections 25 and 29 of the Contract Act will be sufficient to support a promise to pay a barred debt; but apart from the question of the promise to pay a barred debt, I contend (i) that the case is out of the Limitation Act; (ii) that a new contract has been made under s. 25 of the Contract Act; (iii) that there is a new contract on new consideration,—viz., our abstaining from pressing for payment. With reference to the accounts and letters acknowledging the debt, I say, that while the debt was still unbarred, I obtained an acknowledgment, which carried me on for a further period, and that each letter after the first gave me further freedom from the

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law of limitation, each several letter forming one of a continuous chain of acknowledgments up to the date of suit. Section 25 of the Contract Act gives express power to constitute a new contract. [GARTH, C. J.—The debt or legacy mentioned in that section must be specific, and the section does not apply to an unascertained amount; here no account is stated, as it was not known what was exactly due.] In England, under the Statute of Limitation, it is not necessary that the account should be stated, but there must be an acknowledgment which implies a promise.—*Sidwell v. Mason* (1). If a letter contains an acknowledgment that some debt is due, then that will be sufficient to take the case out of the Statute.—*Shearman v. Fleming* (2). A general promise to pay an amount of an account, of which the party does not know the amount, is equivalent to saying “I will pay when the amount is ascertained.” A general admission of some debt seems sufficient. In *Dichenson v. Hatfield* (3) a letter admitting a balance due, without stating the amount, was held sufficient. In *Cheslyn v. Dalby* (4) the amount had not been ascertained by either party, but a promise was given to pay when the amount should be ascertained; and this also was held sufficient to carry the case out of the Statute. That case is very similar to the present. [GARTH, C. J.—The case of *Bird v. Gammon* (5) is very similar to the present case, and the promise there was held to be sufficient.] In *Harrison v. Hope* (6) the acknowledgment of the debt was only gathered by implication from the letter between the parties; the amount was claimed by the plaintiff in their letters, but the defendant mentioned no amount in his acknowledgment. This was held sufficient. [Mr. O’Kinealy.—Until Kali Pershad died in 1874, the parties say that they did not know how much was owing.] In *Rendal v. Carpenter* (7) a letter acknowledging a debt due, but asking for the exact amount, was held sufficient. In

(1) 2 H. & N., 306.

(4) 4 Y. and C., Exch., 238.

(2) 5 B. L. R., 619.

(5) 3 Bing., N. C., 883.

(3) 5 C. & P., 46.

(6) 9 B. L. R., App., 43.

(7) 2 Y. & J., 484.

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the present case the defendant must have known the amount, as the loans were made for the purpose of paying the Government revenue, and that was payable by fixed kists. In *College v. Horn* (1) the defendant, although knowing what was claimed, did not know what was due, but was ready to come to a settlement. This was held sufficient to carry the case out of the Statute. [GARTH, C.J.—Is a promise to pay without a knowledge of the amount sufficient?] Yes; it has been so held in *Lechmere v. Fletcher* (2).

Mr. P. O'Kinealy (Baboo Annoda Pershad Banerjee with him) for the respondents.—It has been contended on the point of limitation (i) that there is a distinct contract in writing under s. 25 of the Contract Act; and (ii) if there be not a sufficient contract, then the letters are a sufficient promise to pay under s. 20 of the Limitation Act. Mr. Phillips says that if he can show an acknowledgment within three years before limitation ran, and subsequent acknowledgments afterwards up to suit, this will be sufficient. That, however, is not the meaning of the section, which is intended to introduce a double restriction. Before the Act an acknowledgment might be made fifty years after the debt was incurred; it was only necessary to be made within three years of suit. Now it must be made within three years of suit, and within three years of incurring the debt. Besides, there must be one principal letter to be relied on as an acknowledgment by itself, and not a series of letters, otherwise where is limitation to start from?—*Rogers v. Montriau* (3). Under Act IX of 1871, s. 20, the acknowledgment must be contained in a writing signed before the expiration of the prescribed period; if that is so, the only letters that can be used against us are the letters after 1874. If Mr. Phillips's construction of s. 20 is correct, viz., that an acknowledgment on an acknowledgment gives a continuous train of fresh starting points for limitation, then s. 21 must have the same construction put upon it, and it has been held that part-payment does not take a case out of the Act.—*Pershad Singh v. Mohes Lal* (4). [GARTH, C.J.—Part-payment is not the

(1) 3 Bing., 119. (2) 1 C. & M., 623. (3) 6 B. L. R., 550.
 (4) Reg. App., 179 of 1874 (unreported).

ground of that decision, but the reciprocity of demand.] The letters do not amount to a new contract in writing within the meaning of s. 25 of the Contract Act. The agreement to be binding must be a contract in writing, and as to what is sufficient to charge a person under such a contract, see *Stanley v. Dowdeswell* (1). As to whether the letters amount to a sufficient acknowledgment, when there is a conditional recognition of the debt the acknowledgment is not sufficient. — *Hales v. Stevenson* (2). An unqualified acknowledgment of the debt must be shown, or if the promise to pay is conditional, the performance of the condition must be shown. — *Hart v. Prendergast* (3). Here we agree to pay on a settlement being come to, and no settlement ever appears to have been made. The letter must contain a distinct admission of a debt, and contain no doubtful expressions. — *Gash v. Maclean* (4). Now, both the Contract Act and the Limitation Act require that the letters relied on should be signed by the person to be charged, or by his authorized agent. On the face of the letters put in, there is neither the signature of Kali Pershad nor of his agent duly authorized. [GARTH, C.J.—No issue has been tried as to whether these letters were the letters of Kali Pershad; but apart from the technical objection that the letters are not signed according to the section, there is the fact that the letters were written, and a very small fact will be enough to give authority.] There was no necessity for the issue to be raised, as the point was not relied on in the Court below. [GARTH, C.J.—There are two cases in which the names of persons charged have been printed, not written, and these have been held sufficient. — *Schneider v. Norris* (5) and *Saunderson v. Jackson* (6)]. The ground of decision in those cases was, that the person charged had written sufficient in the body of the contract to bind himself by the printed signature. [GARTH, C.J.—If print is enough, the question is, whether the writing by an agent of his principal's name is not equivalent to the writing by the principal of his

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(1) L. R., 10 C. P., 102.

(2) 9 Jur., N. S., 300.

(3) 14 M. & W., 741.

(4) 2 All. H. C. Rep., 403.

(5) 2 M. & S., 286.

(6) 2 B. & P., 238.

1880 own name?]
 MOHESH LAL should have been stamped. [GARTH, C.J.—The objection was
 v. not taken in the Court below, and as the letters have been
 BUSUNT admitted in evidence, the objection cannot be taken on appeal.]
 KUMAREE. There are cases to that effect; but they are cases in which the
 letters or documents were used for the simple purpose of being
 a contract. Next, as to the form of decree, if the decree
 of the lower Court is reversed, the decree for so much as
 the widow has not received can only hold her liable as represen-
 tative; and then comes the question, whether an acknowledg-
 ment by a Hindu widow can bind her husband's estate. I
 submit not, and it has been so decided in *Sitaram Bhat v.*
Sitaram Ganesh (1).

The following judgments were delivered :—

MACLEAN, J. (after shortly stating the nature of the suit and
 defence, continued):—The first point in the defence filed by the
 Collector on behalf of the defendants is a denial of the alleged
 statement of account by the defendant on the 13th Bhadro 1282
 (30th August 1875), and the Subordinate Judge embodied this
 plea in the third issue, and decided against the plaintiff, in favor
 of the defence. The first nine paragraphs of the petition of
 appeal attack this finding. We propose to dispose of this part of
 the case before entering upon a consideration of the intricate
 questions raised in the other grounds of appeal and in the able
 arguments which have been addressed to us. [His Lordship
 then went into the evidence on this portion of the case, and as
 to that affirmed the judgment of the Court below.]

But then comes the question (assuming this account of 1875
 not to be proved), whether so much of the plaintiff's claim as
 became due more than three years before suit, is barred by
 limitation? The lower Court has held that it is so barred. But
 it has been contended here, on behalf of the appellant, that, whilst
 the account was running, Baboo Kali Pershad, in his lifetime,
 and the defendants since his death, have made such acknowledg-
 ments, from time to time, of the existence of the debt, as will
 take the case out of the operation of the Limitation Act.

This question does not appear to have been adequately brought to the notice of the Court below ; and as it is one of some nicety, it is necessary to go carefully into the facts as well as the law for the purpose of deciding it.

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We start then with an account, which was admittedly adjusted and signed by Kali Pershad himself, showing a balance due from him to the plaintiff's firm, at the close of the Mahajani year 1274, of Rs. 13,611-2-6. It is obvious that the account must have been adjusted up to the end of the Mahajani, and not the Fusli, year 1274, because the Fusli year begins on the 1st of Assin, whilst the Mahajani year begins 24 days later,—viz., on the 25th of Assin; and this account, which purports to be for the three years, 1272, 1273, and 1274, runs from the 25th of Assin to the 24th of the following Assin in each year, and brings the account down to the close of the year 1274, so that the 24th of Assin, which is the last day of the Mahajani year 1274, must needs be the 24th of Assin 1275 of the Fusli year; and as the account would hardly have been prepared until after the close of the year, and could not have been brought to the notice of Kali Pershad until after it had been completed, it follows that Kali Pershad could not have signed and settled it until at least two or three days after the 24th of Assin 1275 Fusli.

Assuming then that the account was signed on or after the 26th of Assin 1275 Fusli, we have in evidence three letters, which purport to have been written by Kali Pershad to the plaintiff's firm within three years after that date, which are said to be sufficient acknowledgments of the debt to prevent its being barred by limitation.

As the suit was brought in September 1877, the Limitation Act by which it is governed is Act IX of 1871, the Act of 1877 not having come into force till the first of October in that year. But here the question arises whether, although the Limitation Act which was in force at the time when the suit was brought is the one to which we must look in order to ascertain the proper period of limitation, still if, under the former Act of 1859, the right to bring this suit was barred, that right can be revived by any promise or acknowledgment made

1880 before the Act passed, which would be sufficient to keep alive the
 MOHESH LAL debt under the Act of 1871, but insufficient under the Act of
 v. 1859. This point, no doubt, presents some difficulty; but we
 BUSUNT think its solution must depend upon, whether, in the case of a
 KUMAREE. debt, the Act of 1859 merely barred the remedy or extinguished
 the obligation. Assuming the debt in this instance to have
 originated with the statement of account in 1867, which gave rise
 to a new and substantive cause of action, if the remedy merely
 was barred at the end of three years from that time, then the debt
 itself was in force at the time of the passing of the Act of 1871,
 and that Act *repealed entirely* the Act of 1859, making new
 provisions both with regard to limitation and also as to the means
 by which limitation might be prevented.

The first apparent difficulty which has presented itself upon
 this point is, that, in two cases it has been held by Division
 Benches of this Court, that, under the Limitation Act of 1859,
 it is not only the remedy that is barred after the expiration of
 the statutory period, but the debt. The first of these cases is
Krishna Mohun Bose v. Okhilmoni Dossee (1), decided by
 Markby and Priusep, JJ. That was a suit for arrears of
 maintenance, and it was held, partly upon the authority of a case
 decided by Mr. Justice Pontifex, *Nokoore Chunder Bose v. Kally
 Coomar Ghose* (2), and partly upon the doctrine supposed to
 have been laid down by the Privy Council in *Gunga Gobind
 Mundul's case* (3), that the suit having been barred under the
 Act of 1859, the debt as well as the remedy was extinguished.

The other case was *Ram Chunder Ghosaul v. Jugyutmonmohiney
 Dabee* (4). In that case the same question came before the pre-
 sent Chief Justice and Mr. Justice Markby, with regard to a
 mortgage-debt; and although the Chief Justice expressed great
 doubt as to the propriety of the judgment in the case of *Krishna
 Mohun Bose* (1), still, as that case had been decided by a Divi-
 sion Bench of two Judges, of whom Mr. Justice Markby was
 one, and as that learned Judge adhered to his opinion, the Chief
 Justice considered himself bound to follow their judgment.

(1) I. L. R., 3 Calc., 333.

(3) 11 Moore's I. A., 345.

(2) I. L. R., 1 Calc., 328.

(4) I. L. R., 4 Calc., 283.

In this case we have again considered the question very carefully, and our attention has been directed to two cases ¹⁸⁸⁰ **MOHESH LAL v. BUSUNT KUMAREE.** decided by the High Court of Madras, in which a contrary view has been taken; see *Valia Tamburati v. Vira Rayan* (1) and *Madhavan v. Achuda* (2). The result is, that we are satisfied that the Madras Court is right. We have had some doubt whether we ought not to refer the point to a Full Bench; but as, upon consulting Mr. Justice Prinsep, we find that he agreed with Mr. Justice Markby in the above case with some hesitation, and that he is now of opinion that the debt is not extinguished by limitation, and as we find that, in a late case, Mr. Justice Pontifex has expressed a similar opinion, we consider that we are justified in deciding the point at once.

But then a further question has suggested itself under s. 20a of the Act of 1871,—viz., whether the provisions of that section as regards acknowledgments were retrospective; or, in other words, whether an acknowledgment *given before the Act of 1871*, which would be sufficient under that Act, but insufficient under the Act of 1859, would prevent a debt from being barred by the Act of 1871. This question appears to us to be answered, and correctly answered, by the Madras case of *Teagaraya Muduli v. Mariappa Pillai* (3). The question there arose, whether payments of interest made before the Act of 1871 prevented the debt from being barred; under the Act of 1859 such payments would have been of no avail; under the Act of 1871 they would keep the remedy upon the debt alive; and it was held, that this provision as to payments of interest was retrospective. We think that the same principle applies to acknowledgments under s. 20. If the acknowledgment fulfils the terms of that section, it would prevent the debt from being barred, whether it was given before or after the passing of the Act of 1871; and it must be borne in mind that, having regard to the repealing clause in the Act of 1871, if the acknowledgments which have been made in this case would not be available under the Act of 1871, it would seem that they would not be available at all.

(1) I. L. R., 1 Mad., 228.

(2) *Id.*, 301.(3) *Id.*, 264.

1880 It, therefore, remains to be seen, whether the acknowledgments given in this case are sufficient under the Act of 1871.

MOHESH LAL v. BUSUNT KUMAREE. By s. 20a of the Act of 1871 any promise or acknowledgment to take the case out of the operation of the Statute must be "contained in some writing signed before the expiration of the prescribed period by the party to be charged therewith, or by his agent generally or specially authorized in that behalf." And when such writing exists, then a "new period of limitation according to the nature of the original liability is to be computed from the time when the promise or acknowledgments were signed."

The time prescribed in this case is three years, and the three letters written in Kali Pershad's name to the plaintiff's firm within three years from the 26th of Assin of 1275 Fusli, are as follows:—1st, the letter marked T 10, dated the 6th of Pous 1276; 2ndly, that marked T 11, dated the 15th of Assar 1276; and 3rdly, that marked T 12, dated the 25th of Assin 1278. These letters are all addressed to the plaintiff, and are written in the same form, commencing, compliments of "Baboo Kali Pershad Singh." They appear to be answers to applications by the plaintiff's firm for the settlement of the account or for the payment of money in part liquidation of it; and they certainly do appear to admit a debt due to the plaintiff, although no mention is made of the amount of it.

But it is argued by the respondent, 1st, that these letters are not proved to have been written either by Kali Pershad himself, or by his agent generally or specially authorized on that behalf; 2ndly, that they are not signed by Kali Pershad or his authorized agent; and 3rdly, that they do not contain a sufficient acknowledgment of the debt within the meaning of s. 20 of the Act.

Now, as to the first of these points, the defendants' dewan, Shital Lal, is called as a witness by the plaintiff. He and his father before him have been the dewans of Kali Pershad for many years, and since Kali Pershad's death he has been the dewan of the defendants, and he is in their service now; so that we may presume that his evidence would rather be in favor of the defendants than otherwise. He says that, after the

account up to the end of the year 1274 had been signed by Kali Pershad, the business went on in the same way as before; and that the letters which Kali Pershad during his life, and the defendants after his death, used to write to the plaintiff upon the subject of the account matters, were either written by himself as dewan when he happened to be present, or, in his absence, by some one else. He says further, that the letters T 10 and T 11 were written by Bharosi Lal, the mohurir of Kali Pershad, and that the letter T 12 was written by his (Shital Lal's) father, who was at that time the dewan of Kali Pershad; and he also says, that the form in which these letters were written, was the same as was always adopted in the correspondence between Kali Pershad and the plaintiff.

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Upon this evidence it seems to us that, as Kali Pershad never wrote letters to the plaintiff himself, but authorized them to be written by his dewan, whose ordinary duty it would be to carry on a correspondence of that kind, we are bound to hold that, at any rate, the letter No. 12, which was written by Shital Lal's father as the dewan of Kali Pershad, was written by him *as his agent generally authorized for that purpose.*

We have more doubt with regard to the authority of the mohurir, Bharosi Lal, to sign the letters T 10 and T 11; but as in the absence of the dewan the mohurir would be the proper person to write such letters, we should have been disposed to hold, if it were necessary, that, even as regards these letters, the mohurir had authority to write them. As, however, we think we must assume that the letter No. T 12 was written within three years from the time when Kali Pershad signed the account for Rs. 13,611-2-6 at the end of 1274, and as the letters T 12, T 13, and T 15, which follow, all admit more or less clearly the existence of a debt, and are all written by Shital Lal as the dewan of the family, it is not necessary for our present purpose to resort to the letters T 10 and T 11, which were written by the mohurir, provided that, in other respects, the letters written by the dewan are sufficient to satisfy the provisions of s. 20.

The next point is, whether the letter was sufficiently signed by Kali Pershad.

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 The Subordinate Judge seems to think, that a formal signature at the end of the letter is necessary for this purpose; but here we think he is in error. As long as the document is signed with Kali Pershad's name by his duly authorized agent in such a way as to make it appear that the letter is his, and that he is the real author of it, we do not think it matters what the form of the instrument is, or in what part of it the signature occurs.

It seems to us that the acknowledgment is quite as effectually signed whether it runs thus—

DEAR SIR,—I beg to acknowledge the correctness of your account.

Yours A. B.

or thus :—

A. B. presents his compliments to C. D., and begs to acknowledge the correctness of his account.

By the 17th section of the English Statute of Frauds, the note or memorandum of the bargain which is necessary in the case of a sale of goods must be signed (in a similar way to an acknowledgment under the Indian Limitation Act) by the party to be charged therewith or his agent thereunto lawfully authorized; and it has been held, under that section, that where a party to a contract signs his name in any part of it in such a way as to acknowledge that he is the party contracting, that is a sufficient signature within the Statute, as for instance, the words "I, James Crockford, agree," "Mr. Stanley agrees," "Sold to John Dodgson," have been held to be sufficient signature by those parties; see *Knight v. Crockford* (1), *Lobb v. Stanley* (2), *Johnson v. Dodgson* (3); and see also *Durrell v. Evans* (4). Indeed, if this were not so, having regard to the peculiar form of letter usually adopted in this country, few acknowledgments of debts, however complete they might be, would be binding under s. 20, if it were necessary that they should be signed at the foot like an English letter.

And as to the name of the principal being written by the agent, it seems clear, that if the agent is authorized to write the letter, it matters not whether he signs the name of the principal or his own name. Thus, under the 17th section of

(1) 1 E.p., 190. (2) 5 Q. B., 574. (3) 2 M. & W., 653. (4) 1 H. & C., 174.

the Statute of Frauds, it has been held, that where goods were sold at auction, and the purchaser authorized the auctioneer's clerk to put down his name as having purchased certain lots, and the clerk accordingly did so, the entry of the purchaser's name so made by the clerk was a sufficient signature under the Statute to bind the purchasers; see *Bird v. Boulter* (1). This case has been since always considered and acted upon in England as good law.—*Durrell v. Evans* (2).

The only remaining question is, whether the letter of the 25th Assin 1278 (Ex. T 12) amounts to a sufficient acknowledgment of the debt to take the case out of the Statute.

Now it is not necessary, according to the provisions of explanation 1 of s. 20 of the Limitation Act, that the acknowledgment should specify the amount of the debt; and according to the authority of many English cases, it is sufficient that the acknowledgment should contain an admission that the debt is due, the amount in such case being proved by parol evidence; see *Tanner v. Smart* (3), *Quincey v. Sharpe* (4), *Sheet v Lindsay* (5). The letter of 25th Assin 1278 was evidently written in answer to a demand made by the plaintiff, for payment of money in part liquidation at least of a debt due to the plaintiff's firm. It states, "next year I will pay all your money out of the collections which will be made according to the jamnabandi, because I cannot be free from your debt; when you are master of the raj how can I be free from your debt; but according to your account it may be liquidated from this year to the next year. Now I have got all the mouzas in direct possession, and I have increased the jamnabandi; now it will not be much difficult to liquidate it. You have written for adjustment of account; I too am willing to it. In the course of a month or two everything will be settled in the villages, and then I will positively send the mohurir to you for adjustment of account." The letter surely contains a clear acknowledgment of a debt being due by Kali Pershad to the plaintiff, and a promise that, in the course of a month or two, the writer will send a mohurir to adjust the account.

(1) 4 B. and Ad., 443.

(3) 6 B. and C., 603.

(2) 1 H. & C., 174.

(4) L. R., 1 Exch. D., 72.

(5) L. R., 2 Exch. D., 314.

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Then follow three other letters, one T 13, dated 22nd Kartick 1279; T 14, dated 18th Bhadro 1280; and T 15, dated 7th Pous 1281. The letters T 13 and T 15, Shital Lal says, were written by himself as the dewan, and by the authority of Kali Pershad; and we think that they (especially that of the 7th Pous 1281) contain direct admissions of a debt being due from Kali Pershad. In the last letter it is said "all the debts of other persons have been paid off through your kindness; now I am only anxious for your money, of which also, through your kindness, I will pay this year as much as I can, and then make settlement."

These letters would also give the plaintiff a further period of three years from the time when they were written.

Kali Pershad died in June 1874 (Assar 1281); and we have then a letter, G 17, dated the 18th of Aughran 1282 (11th of December 1874), from the defendants to the plaintiff, written, as Shital Lal says, by the direct authority of the defendants. The defendants say in that letter, "you have written that you will now take steps to recover your money, so that we will not blame you afterwards. We do not disagree with you. As you have always been kind to the Baboo, you should now be more kind to us; therefore, we give you this trouble, that as you have waited so long, you will be pleased to wait for a short time more, then we will settle your account."

That again is a direct acknowledgment of the plaintiff's debt, which gave him another three years to sue for it; and this suit is brought within that period.

We are of opinion, therefore, that so far as the plea of limitation is concerned, the plaintiff's suit is not barred; and that it is only a question of evidence what amount is now due upon the account. As that question has not been considered by the Court below, except as regards the accounts for the three years next preceding this suit; and as the defendants' counsel informs us that, in the interest of his clients, he desires that those

accounts should be investigated, it is necessary that we should remand the case to the Court below for that purpose. That Court will report to us what amount is found to be due upon the investigation, and we will then dispose finally of the case.

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GARTH, C. J.—I only desire to add that, as regards myself, I have felt some difficulty, in consequence of the decision, to which I was a party with Mr. Justice Markby, in the case of *Ram Chunder Ghosaul v. Juggutmonmohiney Dabee* (1), where we held that the Limitation Act in this country extinguished the debt as well as barred the remedy.

I was by no means satisfied, as I stated at the time, of the correctness of that decision; but as the point had been directly decided by a Division Bench of this Court, consisting of Mr. Justice Markby and Mr. Justice Prinsep, in the case of *Krishna Mohun Bose v. Okhilmoni Dossee* (2), and as my brother Markby did not see the propriety of referring the question to a Full Bench, I felt bound, according to our usual practice in this Court, to follow the previous decision.

I confess, that it has been a great satisfaction to me to find that, since that judgment was delivered, not only Mr. Justice Prinsep, but several other Judges of this Court, have arrived at the conclusion that our decision was wrong.

The High Court of Madras has also, in several cases, expressed a similar view; and as this appears, so far as I am aware, to be the general opinion of the Court as at present constituted, we have considered that it is not necessary to submit the question now to a Full Bench.

I believe that the erroneous view which prevailed here for a time was due mainly to a misunderstanding of the observations of the Privy Council in the case of *Gunga Gobind Mundul* (3). It seems clear that those observations were only intended to apply to suits for the recovery of immoveable property.

Case remanded.

(1) I. L. R., 4 Calc., 283.

(2) I. L. R., 3 Calc., 333.

(3) 11 Moore's I. A., 345.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

1880
Sept. 10.

DORAB ALLY KHAN (PLAINTIFF) v. ABDOOL AZEEZ (DEFENDANT)

AND

ABDOOL AZEEZ (DEFENDANT) v. DORAB ALLY KHAN (PLAINTIFF).

Sale by Sheriff in Execution of Decree—Payments of Purchase-Money on agreement as to possession between Purchaser and Execution-Creditor—Sale subsequently set aside—Suit for Money had and received—Accord and Satisfaction—Novation—Limitation.

On the 9th of October 1866, the Sheriff of Calcutta executed a bill of sale to *A* of a certain taluk situated in Oudh, of which *A* afterwards obtained possession. In consequence of an impression that the sale was illegal, *A* directed the Sheriff not to pay the money to *B*, the execution-creditor, and the money remained in the hands of the Sheriff until the 24th of October 1867, when *A* directed the payment of the money to *B*, in consequence of an arrangement then come to between *A* and *B*, to the effect that, if *A* should be ousted from the possession of the property within a year, *B* should take measures to reinstate him at his (*B*'s) expense. *A* died without heirs in July 1868, and the Government of Oudh, not being aware that *A* had left a will, took possession of the taluk, partly as on an escheat, and partly because there were arrears of revenue due on the property. On the 2nd of October 1868, an order was passed by the Collector of the district in which the taluk was situate, declaring the sale by the Sheriff illegal, and directing the return of the taluk to its former owners, which was done in April 1869. In a suit brought by *A*'s executors against *B* in September 1872 to recover the purchase-money, as money had and received, as upon a total failure of consideration :

Held, that the agreement of the 24th of October 1867 operated as an accord and satisfaction of all rights which *A* might have had to a return of the purchase-money or to damages, and that the only remedy which *A* had, was an action on the agreement.

Held also, that no breach of the agreement of the 24th of October 1867 had in fact occurred, and that, even if the agreement had been broken, the suit was barred by limitation.

APPEAL and cross appeal from a decision of Wilson, J., dated 9th March 1880, dismissing the suit.

The plaint in this case was filed by the executor of a purchaser at a Sheriff's execution-sale, who claimed from the execution-

creditor a return of the purchase-money, alleging that it was money had and received to the use of the plaintiff's testator, as upon a total failure of consideration. The suit was instituted in September 1872, and came on for hearing before Mr. Justice Phear, who dismissed it, on the ground that the plaint disclosed no cause of action, and this decision was affirmed on appeal (1). The plaintiff appealed to Her Majesty in Council, who reversed the concurrent decisions of the High Court and remanded the suit for trial on the merits (2).

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On the trial of the case before Mr. Justice Wilson, it appeared that Moheroddeen, whom the defendants represent, held a judgment of the Supreme Court against certain persons. On the 18th of June 1866, a writ of *fiery facias* issued to the Sheriff of Calcutta in the form then usual, directing him to levy the amount of the judgment. Moheroddeen directed the Sheriff to seize lands belonging to the judgment-debtors at Lucknow. On the 9th of October 1866, the Sheriff, by bill of sale, sold the lands which had been seized to Deanut-ud-Dowlah, whom the plaintiff represents, for Rs. 26,000. The purchase-money was paid to the Sheriff, and Deanut-ud-Dowlah obtained possession of the lands.

Shortly afterwards, it appears that the question of the validity of the sale came before the Commissioner and the Judicial Commissioner of Lucknow, and they held the sale to be invalid. Deanut-ud-Dowlah took the opinion of the then Advocate-General, who advised him to the same effect. Thereupon, on the 18th of February 1867, he gave notice to the Sheriff not to pay over the money to Moheroddeen, and the Sheriff, who at this time had Rs. 21,000 of the purchase-money in his hands, Rs. 5,000 having been paid over on the 29th October 1866, obeyed the notice and retained the money. On the 22nd October 1867, Mr. Goodall, as attorney for Deanut-ud-Dowlah, wrote to the Sheriff as follows:—

“I am instructed by my client, Deanut-ud-Dowlah, Bahadoor, to request you to pay the amount of purchase-money to the party claiming it; my client reserves to himself all right to dispute the sale and claim the purchase-money.”

(1) See I. L. R., 1 Calc., 55.

(2) See L. R., 5 I. A., 116; S. C., I. L. R., 3 Calc., 806.

1880 On the 24th of October 1867, Mr. Goodall again wrote to the
 DORAB ALLY Sheriff, saying:—
 KHAN “I am instructed by my client, Deanut-ud-Dowlah, Bahadoor,
 v. to request you to pay the purchase-money in your hands to Kha-
 ABDOL jah Moheroddeen, inasmuch as there has been an arrangement
 AZEEZ. entered into between the parties, that, should my client be ousted
 — from the property at Lucknow within the space of one year,
 ABDOL Khajah Moheroddeen undertakes to adopt the necessary steps
 AZEEZ to reinstate my client at his own costs and expenses. My
 v. client further states that this arrangement was entered into in
 DORAB ALLY your presence, and at your office in Radha Bazar.”
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The Sheriff confirmed the correctness of the statements contained in that letter, and, in accordance with its directions, paid over the money. Deanut-ud-Dowlah remained in possession till his death, which took place in July 1868. He was an Arabian eunuch in the service of the King of Oudh, and, inasmuch as he had apparently died without heirs, the officers of Government immediately took possession of all his property, both here and at Lucknow, upon an escheat. The lands in question were seized under an order of the officiating Deputy Commissioner, dated the 8th August 1868, “on account of arrears of revenue by reason of there being no heirs of the deceased numberdar, Deanut-ud-Dowlah.” The deceased, however, left a will, by which he appointed the plaintiff executor. That will was put in evidence at the hearing of the cause.

It appeared from the documentary evidence, that at the time of Deanut-ud-Dowlah's death, some proceedings, the exact nature of which does not appear, were pending at Lucknow with reference to the property and the validity of the sale. On the 1st of May 1868, Deanut-ud-Dowlah presented a petition of appeal in the Commissioner's Court “against an order of Mr. Capper, officiating Commissioner of Lucknow, directing a certain issue to be tried.” This appeal was dismissed on the 7th of September 1868, the Commissioner declaring that “the Judicial Commissioner, having, in his letter, No. 868, dated 26th ultimo, pronounced the sale of the land in suit by the Sheriff's officer null and void, the purchaser, Deanut-ud-Dowlah takes nothing under that sale, and has not any *locus standi* in this Court. This

appeal is accordingly hereby dismissed." Nothing is shewn to have followed upon that order.

A subsequent order of the Deputy Commissioner was produced, bearing no date, intituled in the matter of the seizure already referred to. It recites that, by a letter of the 26th of August 1868, the Judicial Commissioner had stated that the sale had been held invalid, and that the property was to be restored to those from whom it had been taken, and the order directs further particulars to be furnished. That order is followed by another, dated 6th April 1869, ordering the property to be made over to certain persons named.

Mr. Justice Wilson held that the agreement, shown in the correspondence of October 1867, amounted to a waiver by Deanutud-Dowlah of all the rights which he then had against Khajah Moheroddeen; and that that agreement had not been broken. He dismissed the plaintiff's suit with costs, and ordered each party to bear his own costs of the appeal to Her Majesty in Council.

The plaintiff appealed; and the defendant filed a cross-appeal on the ground that the learned Judge was wrong in not directing the plaintiff to pay the costs of the appeal to the Privy Council.

The *Advocate-General* (Mr. G. C. Paul) and Mr. *Kennedy* for the appellant.

Mr. *Bonnerjee* and Mr. *O'Kinealy* for the respondent.

The *Advocate General*.—We are entitled to recover the purchase-money or damages. Now, the money which we paid to the Sheriff, must be taken to have all been paid to the execution-creditor, for, though we notified the Sheriff not to pay it over, yet he was bound to disobey our order, and to hand over the money to the execution-creditor, even though the sale was a nullity. In Archbald's Practice, Vol. I., p. 586, it is laid down that "the Sheriff is liable to the plaintiff for the amount of the levy. If *fiery faci* be returned, the plaintiff may proceed against him for the money by rule of Court, or by action of debt, account, or assumpsit, which will lie against him or his executors for the

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1880 amount levied, though no return has been made; for, though
DORAB ALLY KHAN there is no actual contract between the Sheriff and the plaintiff
v. yet the levying of the money creates a contract between them.
ABDOOL AZEEZ. Such action is maintainable, though there has been demand for
— the payment of the money." [GARTH, C. J. :—The mistake arose
ABDOOL AZEEZ from the fact that the Sheriff had no jurisdiction to sell property
v. in the province of Oudh. That was a mistake of law. Must not
DORAB ALLY KHAN. the plaintiff be taken to know that the Sheriff had no authority
to sell? He took his chance.] No. The plaintiff would not be
bound to know the extent of the Sheriff's jurisdiction—*Cooper v.*
Phibbs (1). Then the fact of our taking a conveyance and enter-
ing into possession does not bar our suit—*In re Turner* (2),
and the consideration has wholly failed, as we were liable to
account to the judgment-debtors. We are not bound by the
agreement of the 24th of October 1867. That was only a with-
drawal of our opposition to paying over the money, and was
intended for the Sheriff alone. The letters taken together show
that the plaintiff reserved his rights against the execution-
creditor. Even were the agreement binding on us, it has been
broken by the defendants, because the plaintiff was evicted by
the order of the 2nd September 1868, within one year from the
date of the agreement.

Mr. *Kennedy*, on the same side, cited *Warlow v. Harrison* (3).

Mr. *Bonnerjee* for the respondent.—The only question really
here is, was the agreement of the 24th of October 1867 broken
by the defendants? for it is clear that at that time the plaintiff's
testator, with a full knowledge of all his rights, entered into a
binding agreement with the execution-creditor. This agreement
was not broken within a year from its date, because, when the
Government entered into possession in July 1868, they entered
as heirs of Deanut-ud-Dowlah, the plaintiff's testator, and con-
tinued in possession in that capacity until the 4th of April 1869.
The proceedings in the Oudh Courts are no evidence against us,
as it does not appear we were parties thereto, and the documents
are so imperfect, that no conclusion can be drawn from them.

(1) L. R., 2 H. L., 149.

(2) L. R., 13 Ch. D., 130.

(3) 1 El. and El., 295.

As to costs, I submit that the learned Judge was wrong in not allowing us the costs of the appeal to the Privy Council. Their Lordships, in their judgment, say that the costs of the appeal are to be "hereafter dealt with by the High Court as costs in the cause."

Mr. *P. O'Kinealy*, on the same side.—The effect of the judgment of the Privy Council is that the defendant is, on the face of the plaint, liable, as the Sheriff's principal, to an action for damages for breach of warranty of authority. The damages must be limited to the amount lost to the plaintiff by reason of the breach alone, and that is only the Rs. 5,000 paid over on the 29th of October 1866, as the remaining Rs. 21,000 were, in obedience to the plaintiff's orders, retained by the Sheriff, and only paid over by him, when directed by the plaintiff to do so, in October 1867; and at that time the plaintiff had full knowledge of all the facts. As against that sum of Rs. 5,000, the plaintiffs admit they collected Rs. 11,000 as rent from the taluk, so that plaintiffs have sustained no damage whatever, and the suit should be dismissed with costs, even if we suppose that the agreement of the 24th of October 1867 is of no effect. As regards that agreement, I submit, the plaintiff is not entitled to rely on it, as he has avoided all mention of it in his plaint. Even if he is allowed to rest his case on that agreement, the suit is barred by limitation under cl. 9, s. 1 of Act XIV of 1859, as the cause of action arose more than three years before the plaint was filed in September 1872.

The following judgments were delivered:—

GARTH, C. J.—The facts, which have been disclosed at the trial before Mr. Justice Wilson, present this case to us in a very different aspect from that which it assumed in the plaint.

The sale by the Sheriff to Deanut-ud-Dowlah took place on the 9th of October 1866. The purchase-money, Rs. 26,000, was then paid to the Sheriff, and the purchasers obtained possession of the property.

It then appears that the Judicial Commissioner of Lucknow expressed an opinion, that the sale was invalid; and Deanut-ud-Dowlah, having taken the opinion of the then Advocate-General, gave notice to the Sheriff, through Messrs. Goodall and Leslie, his

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1880 attorneys, that the sale was irregular, and required him not
DORAB ALLY to part with the purchase-money.

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It is clear, therefore, at this time Deanut-ud-Dowlah and his advisers had ample notice of the alleged invalidity of the sale; and that he might have then taken steps, if he had thought proper, to set the sale aside, and obtain a return of his purchase-money, which was still in the Sheriff's hands.

If he had taken this course, the parties might have been placed in their original position without difficulty. The purchaser would have obtained his purchase-money, the execution-debtor would have had his property restored to him, and the execution-creditor might have proceeded at once, by issuing process from Calcutta, to the Civil Courts in Oudh, to re-sell the property again within the Oudh jurisdiction.

Instead of this, Deanut-ud-Dowlah, as far as appears, took no further steps in the matter, beyond writing again, through his attorneys, to the Sheriff in the same month of February 1867, requesting him again not to part with the purchase-money under pain of being held personally liable for it.

Eight months after this, and upwards of a year from the date of the sale, Mr. Goodall, as Deanut-ud-Dowlah's attorney, again wrote to the Sheriff, requesting him to pay the purchase-money to the execution-creditor; but at the same time reserving himself a right to dispute the sale, and to claim a return of the purchase-money.

It is obvious that this letter involved much inconsistency, and was calculated, if acceded to, to place the Sheriff in a very unfair position.

He had complied with the requirements of the purchaser not to part with the purchase-money. He had waited eight months to give him an opportunity of taking steps to annul the sale, and to obtain a return of his money; but no such steps had been taken.

By this letter, he desired the Sheriff to pay over the money to the execution-creditor, thereby, of course, confirming the sale, but at the same time reserving to himself the right to dispute the sale, and to claim a return of the purchase-money from the Sheriff. It was not likely that the Sheriff would have consented to

place himself in such a dangerous position ; and consequently, we find, from a letter written by Mr. Goodall two days afterwards, that an arrangement was come to by the parties to this effect, that, in consideration of the purchase-money being paid over by the Sheriff to the execution-creditor, the latter agreed, that, if Deanut-ud-Dowlah should be ousted from the property within a year from the 24th October 1867, he (the execution-creditor) would adopt the necessary steps to reinstate him at his own costs and expenses.

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This arrangement appears to have been made between the parties at the Sheriff's office in Calcutta, and the Sheriff wrote a letter to Mr. Goodall, confirming the arrangement, and paid over the purchase-money to the execution-creditor accordingly.

From that time until his death, which happened in July 1868, Deanut-ud-Dowlah remained in possession of the property. It then appears to have been taken possession of by the Government officers by order of the officiating Deputy Commissioner, partly on account of there being an arrear of revenue due upon it, and partly because Deanut-ud-Dowlah, being a eunuch, and consequently having no heirs, the property was supposed to have escheated to the Crown.

Now, I entirely agree with the lower Court, that, whatever rights Deanut-ud-Dowlah might have had originally as against the Sheriff, or the execution-creditor, those rights were superseded, and put an end to by the arrangement which was come to between the parties.

It is plain that Deanut-ud-Dowlah was anxious to keep the property if he could. It is also pretty plain, that neither he, nor the execution-debtor was anxious to take proceedings to invalidate the sale ; and it is very probable, that in October 1867, when the agreement was made, Deanut-ud-Dowlah, who had already had the property in his hands for upwards of a year, might have considered with some reason, that he would be pretty safe, if his possession were not disturbed for another twelve months.

The arrangement, therefore, was a reasonable one for all parties ; and the conditions under which it was made, appear to me perfectly inconsistent with the purchaser's retaining his original

1880 right to treat the sale as a nullity, and to obtain back his
 DORAB ALLY purchase-money. He had parted with the purchase-money
 KHAN voluntarily; he had placed it out of the power of the execution-
 v. creditor to proceed against the execution-debtor to realize his
 ABDOOL judgment-debt; and, in lieu of the rights which he originally had,
 AZEZ. to obtain back his purchase-money, and give up the property,
 — he had obtained what he evidently valued much more, his
 ABDOOL present right to retain possession, and an undertaking by the
 AZEZ execution-creditor to take steps to reinstate him in that pos-
 v. session, in the event of his being ousted from it within the
 DORAB ALLY space of a year.
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He thus secured a remedy very different from that which he originally had, and a remedy which he thought would secure him in the possession of the property. I, therefore, am quite unable to agree with the Advocate-General, who contended that, after the arrangement was made, Deanut-ud-Dowlah retained his original rights, or that those rights revived, upon his being turned out of possession after the expiration of the year.

His rights, as it seems to me, must now be confined to the agreement.

It remains then to be seen, whether there was any breach of that agreement; and, if so, whether the present plaintiff, who claims as executor under Deanut-ud-Dowlah's will, can avail himself of it in this suit.

A question has been raised by the defendant, whether the will of Deanut-ud-Dowlah has been duly established. Of course without this will the plaintiff would have no ground of action; but the Court below has held, that the evidence is sufficient to establish the will, and I quite concur in that opinion.

It is then contended by the Advocate-General, that there was a breach of the agreement of the 24th of October 1867, and that, within the meaning of that agreement, Deanut-ud-Dowlah, or the plaintiff who represented him, was ousted from the property before the 24th of October 1868.

There was a proceeding offered in evidence by the plaintiff, which took place before Mr. Wood, the Deputy Commissioner, dated the 2nd September 1868. It seems that the Deputy Commissioner, acting upon some letter of the Judicial Commissioner,

dated 2nd January 1867, of which we know nothing, considered that the property in question, which was supposed at that time to have escheated to the Crown, ought to be restored to the party from whom it had been taken; but, as it was not known who that party was, and as it was necessary to enquire into the particulars of the property, before the Court could properly decide anything in the matter, an enquiry was ordered, as to who was the recorded proprietor, and who purchased the property, and other particulars.

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From that time until the 6th of April 1869, it does not appear that anything further was done. But it was on that day reported to the same Court, that the original debtor, Mahomed Wazir Khan, had died, and that two persons, Hossein Ali Khan, the son, and Mussamut Khorshed Begum, the widow of Wazir Khan ought to be recognised as the parties from whom the property had been taken. There is no evidence whatever that, from the time when the property was taken possession of by the Collector, upon the ground that it had escheated to the Crown in default of heirs of Deanut-ud-Dowlah, any change was made either in the mode of possession or of the management.

Nothing seems to have been done as regards the property, in pursuance of the order of 2nd September; and it is clear that possession was never given to the representatives of the judgment-debtor until after the 6th of April 1869.

The Advocate-General contends, on behalf of the plaintiff, that he has a right to use the order of 2nd September in this way. At the time that order was made, the property was in the hands of the Collector in right of Deanut-ud-Dowlah; but, from the time when that order was made, the Advocate-General contends, that it was held by the Government officers, not as an escheat, but on behalf of the persons, whoever they might turn out to be, who were deprived of it at the time of the sale by the Sheriff.

Mr. Bonnerjee, on the other hand, contends in the first place, that this order of the 2nd September, which was objected to at the trial, was not admissible in evidence as against his client; and that, even if it were, it does not appear that anything followed upon it except an enquiry, which did not change in any way the nature of the possession or management of the property.

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I confess I am unable to see how the order of the 2nd September *per se* can be made evidence against the defendant. If it had been accompanied by any actual change in the possession of the property, or the reception of the rents, it might perhaps be made evidence; but, as nothing of that kind was proved, and, as the defendant was no party to the proceedings, I do not see how the order can properly be made to affect him.

That being so, it seems to me, that there was no evidence of the ouster of the possession of Deanut-ud-Dowlah, or of the persons who represented him in interest, until the 6th of April 1869, which was more than a year after the making of the agreement of October 1867; and I agree with the Court below that no breach of the agreement has been proved.

But even supposing that the order of the 7th September 1867 were admissible in evidence, and could be considered as having, in any way, been the means of ousting Deanut-ud-Dowlah's representatives, then the further question would arise, whether the plaintiff has any right to avail himself of the agreement of 1867 in this suit.

He entirely ignored the agreement in his plaint, and his suit is founded entirely upon his original rights which have been superseded; and, if I thought that any breach of the agreement had taken place, and that the plaintiff was entitled to avail himself of it in this suit, I certainly should not be disposed, considering that he has carefully kept out of sight this agreement, of which of course he must have been well aware, to allow him any costs of suit.

But, then, another and a far more serious difficulty in the plaintiff's way has occurred to us in the course of the argument, *viz.*, that, assuming the plaintiff to have any cause of suit upon the agreement, it is clearly barred by limitation. And probably it was for this reason that he brought his suit for money had and received, instead of relying upon the agreement. The Limitation Act which governs this case is Act XIV of 1859. The plaint was filed on the 14th of December 1872; and the Limitation Act of 1871 did not apply to suits instituted before the 1st of April 1873.

This case is therefore governed by s. 1, cl. 9 of the Act of

1859, which allows the plaintiff three years only from the time when the breach of contract took place.

Now the breach of contract here, if any, occurred when the defendants neglected to take steps to reinstate the plaintiff in the property; and the time when that occurred, was either on the 2nd September 1868, when the order, upon which the Advocate-General relies, was made, or at what would have been a reasonable time for the defendants to have taken steps to reinstate the plaintiff.

Now, even if we were to allow six months, which appears to me much more than a reasonable time for such a purpose, that would only carry the plaintiff up to the 2nd March 1869; and this suit, not having been brought until December 1872, is clearly out of time.

The real truth is, that there was no attempt on the plaintiff's part to obtain from the defendant any performance of the agreement; and it is pretty clear, from the plaint being entirely silent as to the agreement, that the plaintiff had no thought of being entitled to proceed upon it.

The cause of action, as put forward in his plaint, was of a totally different character; and it was not until he found himself driven to rely upon the agreement, that his counsel attempted to shift his ground, and base his claim upon it. I am of opinion that the appeal should be dismissed, with costs, on scale 2.

But Mr. Bonnerjee contends that, besides the costs of the trial, which have been awarded to his client in the Court below, the defendant is entitled to the costs of the appeal to the Privy Council.

He relies upon the fact that the Privy Council directed that the costs of both sides should be taxed, in order that the lower Court should deal with them as costs in the cause. He contends that it was the obvious intention of the Privy Council that the costs in that Court should go to the successful party, as part of the general costs of the cause.

But it appears to me, that this was not their Lordships' intention.

I think they intended to leave the costs in the Privy Council to be dealt with by the Judge who tried the cause at his discre-

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1880 tion; and I think Mr. Justice Wilson exercised a wise discretion
DORAB ALLY in making each party bear their own costs of that appeal.

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PONTIFEX, J.—I also think the judgment of the lower Court should be affirmed.

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The *Fi Fa* was executed on the 4th October 1866, and the bill of sale to the plaintiff's testator was executed on the 9th October 1866; but the purchase-money remained in the hands of the Sheriff (who had by that time quitted office), till the 24th October 1867, the plaintiff's testator having warned the Sheriff not to hand it over to the execution-creditor.

Under these circumstances, the plaintiff's solicitors wrote to the ex-Sheriff, on the 24th of October 1867, as follows: (reads letter set out, *ante* p. 358.)

Upon that the money was paid over to the execution-creditor (the plaintiff's testator having already been in possession one year) and, under the circumstances, I am of opinion that this arrangement must be treated as a substituted agreement, forming a complete accord and satisfaction of the original cause of action.

And I am further of opinion that the ouster, contemplated by the substituted agreement, was an ouster by the judgment-debtor or his representatives; and that, if a covenant for title had been settled under the agreement, such covenant would not have been general against the acts of the whole world, but would have been confined to acts by the judgment-debtor or his representatives.

The plaintiff's testator died on the 26th of June 1868, while in possession, and thereupon Government, by its officers, entered into possession. It is doubtful whether such entry was made as for an escheat, the plaintiff's testator having been a eunuch, or for non-payment of Government revenue. But, whichever may be the case, while in such possession, the Collector, in September 1868, on the alleged authority of a letter from the Commissioner, which letter is not produced, declared the sale under the *Fi Fa* inoperative; and directed an enquiry to be made for the judgment-debtor or his representatives. The possession of the Collector, however, continued until April 1869, when he made an order that possession should be restored to the representatives of the judgment-debtor. The representatives of the judgment-

debtor do not appear to have been parties to the proceeding in which such order was made; and, until they took possession under the order of April 1869, being more than one year after the date of the agreement, I fail to see that there was any ouster by them protected by the terms of the agreement. Indeed, but for the death of the plaintiff's testator without heirs, and the consequent entry and unauthorised action of the Collector, I see no reason to believe that the possession of the plaintiff's testator would have been disturbed.

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In my opinion, therefore, the ouster was no breach of the agreement referred to in the letter of the 24th October 1867.

The plaintiff has not furnished us with the proceedings before the Commissioner, and excuses himself by alleging that these proceedings have been lost or destroyed, or, from lapse of time, were not procurable. But this is really no excuse; for, in April 1869, they could have been easily obtained; and it was his own negligence not to obtain them; yet he now asks us to grope in the dark, and give him a decree in ignorance of what was the real nature of the proceedings. Moreover, he does not institute his suit until the 2nd September 1872. He proves no intermediate notice, calling on the defendant to fulfil the agreement of 24th October 1868; and, even if we could treat his suit as a suit for breach of that agreement of the 24th October, he would, in my opinion, be barred by limitation under the Act of 1859, which allowed a period of three years for a suit upon such an agreement. If the plaintiff had duly called on the defendant in reasonable time, the latter might have exercised pressure on the representatives of the judgment-debtor, while his judgment was still alive and capable, by proper process, of being executed against this very property. I think, therefore, the plaintiff fails altogether, and I see no reason to interfere with the discretion exercised by the lower Court as to costs.

Appeal dismissed.

Cross-appeal dismissed.

Attorney for the appellant: Mr. *Dover*.

Attorney for the respondents: Mr. *Paliologus*.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

1879
August 29. CHUNDER COOMAR ROY AND ANOTHER (DEFENDANTS) v. GOCOOL
CHUNDER BHUTTACHARJEE (PLAINTIFF).*

*Civil Procedure Code (Act X of 1877), s. 32—Adding Parties as Plaintiffs—
Act XXVII of 1860, s. 2—Holder of Certificate of Administration.*

A sued as only son and heir of his father *B*. *C*, the widow of *B*, having, with the concurrence of *A*, taken out letters of administration to *B*'s estate, was, on the application of *A* at the hearing of the suit, made a co-plaintiff under s. 32 of the Civil Procedure Code.

Held, that *C* ought not to have been joined as a plaintiff in the suit, inasmuch as *A* had no right at all to sue.

Section 32, as far as the addition of plaintiffs is concerned, only applies to those cases in which the original party who brought the suit had some title to sue.

Per PONTIFEX, J.—The power given by s. 27 of the Code ought to be exercised before the first hearing of the case.

Held also, that s. 2 of Act XXVII of 1860 prohibited *A* from suing alone, for although he was, no doubt, beneficially entitled to recover it, yet there was no vexatious or fraudulent withholding of the debt within the meaning of that section.

Per GARTH, C. J.—A debt cannot be said to be “vexatiously withheld” within the meaning of that section, simply because the debtor omits to pay it.

APPEAL from a decision of WILSON, J.

This suit was brought by Gocool Chunder Bhattacharjee, as the only son and heir of his father Sibchunder Bhattacharjee, to recover from the defendants the amount of principal due on a joint and several promissory note executed by the defendants in favor of Sibchunder, and dated the 6th of June 1875, together with the balance of interest thereon from March 1878, the whole sum sued for being Rs. 6,736.

Sibchunder died on the 24th May 1878, and the plaint was filed on the 5th of June 1878. On the 6th of June, letters of administration of the estate of Sibchunder were granted to his widow Kisto Kaminee Dabee.

When the case came on for hearing, an application was made that the administratrix should be added as a plaintiff under s. 32 of the Civil Procedure Code. This application was

* This case was inadvertently omitted, but being important is now inserted.

granted, and a decree was given by Wilson, J., to the two plaintiffs, for the full amount of the claim, with interest and costs.

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From this decision the defendants appealed.

Mr. *Phillips* and Mr. *J. G. Apcar* for the appellants.

Mr. *Bonnerjee* and Mr. *Mitter* for the respondent.

The following judgments were delivered :—

GARTH, C. J.—I think that the Court below had no power, under the circumstances, to add the name of the administratrix as a co-plaintiff, or to give a decree in favor of both the plaintiffs.

The amendment was made at the trial under s. 32 of the Civil Procedure Code, which allows the Court “to order that the name of any person who ought to have been joined in the suit, either as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate and settle all questions involved in the suit, should be added.” That section, so far as the addition of plaintiffs is concerned, appears to me to apply to those cases only where the plaintiff who has brought the suit is one of the right parties to sue, but some other person, either as being his co-contractor, or otherwise jointly interested with himself, ought to have been joined as a co-plaintiff. I do not think that the section is intended to enable a plaintiff who has brought a suit without having any right to do so, to add the name of a person who has the right to sue, and to obtain a decree in right of that person; and I rather think that the learned Judge in the Court below was of that opinion, because he goes into the question of whether the original plaintiff in this case had a right to sue, and decides that he had, because the defendants were vexatiously withholding the debt from the plaintiff, and so the case came within the exception in s. 2 of Act XXVII of 1860.

Now it appears to me that, in this case, there is no ground whatever for saying that the defendants “vexatiously withheld” the debt from the plaintiff. The plaintiff, of course, could have no claim whatever to the money till the death of his father Sibchunder on the 24th of May 1878. Within twelve days of

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that time,—namely, on the 3rd of June 1878,—the plaintiff brings this suit. It does not appear that Sibchunder ever required payment of the debt in his lifetime, nor that the plaintiff ever asked for it before he brought this suit. There certainly was no refusal on the defendants' part to pay it; and so far from the debt being withheld vexatiously or fraudulently, it appears from the answers to the interrogatories which have been put in by the plaintiff himself, that the defendants have been trying to make an arrangement to pay whatever was due from them to the plaintiff as well as to the other creditors.

The real reason why the suit was brought so soon after Sibchunder's death, was very candidly admitted by the plaintiff's counsel to have been, because the promissory note bore date the 6th of June 1875, and the plaintiff's advisers filed their plaint on the 5th June 1878 to prevent the claim being barred by limitation.

But then Mr. Bonnerjee for the plaintiff contends, that where there is no real doubt as to the person entitled to receive a debt, the payment of it must be considered to be withheld vexatiously if the debtor simply omits to pay it. But this, in my opinion, is not the meaning of the section. If it were, I think the object of the Act would be entirely defeated. The heir of a deceased Hindu or Mahomedan might then always sue for a debt due to his ancestor without even asking for it; and unless the defendant could show at the trial that he had any reasonable doubt as to the party entitled to receive the money, the plaintiff would be entitled to recover. This would not be affording to the debtor the protection which the Act intended to give him, and it would be giving no meaning, except perhaps a very strained and unnatural one, to the words "withheld from fraudulent or vexatious motives."

I consider the intention of the Act to be, that, as a general rule, no Court shall compel any debtor of a deceased Hindu or Mahomedan to pay his debts to any person unless such person shall either have obtained a certificate under the Act, or probate of the deceased's will, or administration to his effects. The only exceptions to this rule are cases where not only there is no reasonable doubt as to the person entitled to receive the

money, but where also the debtor withholds the debt from fraudulent or vexatious motives. The mere nonpayment of the debt when it has never been asked for, or where the debtor is doing his best to pay it, is to my mind clearly not a withholding it from fraudulent or vexatious motives.

I am strongly disposed to agree with what fell from my learned colleague during the argument, that if the heir of a deceased Hindu sues for a debt without having obtained a certificate or probate or administration, upon the ground that his case is within the exception,—that is to say, that there is no reasonable doubt that he is the person entitled to receive the debt, and that the defendant is withholding it from fraudulent or vexatious motives;—if he does not make this statement, it ought to be a good answer on the part of the defendants that the plaintiff has not obtained a certificate or probate or letters of administration, and consequently that he has no right to sue.

The Madras High Court has held in *Govindappa v. Kondappa Sastrulu* (1), that it is sufficient for the plaintiff to be prepared at the trial with proof of his certificate when he has stated in his plaint that he has applied for it, and possibly it might be right (in analogy to cases in England, where a party sues as executor or administrator, and obtains his probate or letters of administration before the trial) to hold that this would be sufficient.

But that is not the plaintiff's case here. He has neither obtained nor intended to obtain administration, and the defendants raised the point by a direct plea that administration had not been granted to the plaintiff, but had been granted with the plaintiff's consent to a third person. The plaintiff, therefore, having no right whatever to sue, and the Court having no power to compel the defendants to pay him the money, he applies at the trial to add the name of the administratrix as a co-plaintiff with himself. He does not apply to substitute her name for his;—that he must have done under s. 27 of the Code, and the Court could not have granted the application unless it had been satisfied that the plaintiff had sued in his own name under some *bond fide* mistake. Here it is not pretended that there was any mistake. Nor was the application made upon the ground that

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the plaintiff and the administratrix claimed the right to this debt in the alternative (see s. 26). Mr. Bonnerjee does not attempt to put his case upon that ground. He contends, that the plaintiff and the administratrix had a joint interest in the debt, the one as the person beneficially entitled, the other as the person who had the legal right to sue.

But even assuming that in some cases it might be proper that a trustee and his *cestui que trust* should join as co-plaintiffs, that could only be in a case where the Court was at liberty, if it thought proper, to make a decree in favor of the *cestui que trust*. But here the Court is expressly prohibited by s. 2 of the Act of 1860 from ordering the defendants to pay the debt claimed to the plaintiff, and it is equally prohibited, as it seems to me, from ordering the defendants to pay the debt to the plaintiff conjointly with some one else who has a better title. If this were permitted, creditors would be deprived of the very protection which Act XXVII of 1860 was intended to afford them. A party, claiming as heir to a Hindu, but having no title as such, might always sue with impunity for a debt due to the estate, and then by bringing into the suit at the last moment the party who is really entitled, they might obtain a joint decree.

In this case the party who had no right to sue brought the suit. The party who had the right did not sue, and yet by making these two persons co-plaintiffs at the trial, the Judge not only places them in a position to obtain a joint decree, but obliges the defendants, who had at any rate an answer to the suit up to the time when the administratrix was joined, to pay the costs of it *ab initio*.

The plaintiff had really no excuse then for the course which he adopted. He might, if he pleased, have taken out administration himself, or when he waived his right in favor of his mother, he might have withdrawn his suit at little or no expense within three days after he had filed his plaint, and allowed another suit to be brought at once in the name of the administratrix. There was no difficulty as regards limitation, because interest had been paid up to March 1878, and the plaintiff had full notice of the mistake he was making, because the point was directly raised in the defendants' written statement.

In order to avoid further delay and expense, I am prepared, if both parties will assent to that course within a fortnight from this date, to allow the decree of the lower Court to stand in favor of the administratrix only, Mr. Bonnerjee's clients paying the costs in both Courts on scale 2. In that case the name of the original plaintiff will be omitted, and the amount of the defendants' taxed costs will be deducted from the amount of the decree.

If the parties do not consent to these terms within a fortnight from this date, the judgment of the Court below will be reversed, and the plaintiff's suit will be dismissed with costs in both Courts on scale 2.

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PONTIFEX, J.—The plaintiff in this case sued as only son and heir of his father to recover the principal and interest, moneys secured by a promissory note granted by the defendants to the plaintiff's father. The plaint was filed on the 5th of June 1878, within twelve days after the death of the father; but the summons was not served on the defendants until the 18th of June. In the meantime, on the 8th of June, an order for a grant of letters of administration to the father's estate was made in favor of his widow. This order could only have been made with the concurrence of the plaintiff, who must have been aware before filing his plaint that it would be applied for.

The defendants, in their written statement, took the objection that letters of administration had been granted to the widow, which precluded the plaintiff from recovering in this suit. The plaintiff, however, elected to go to trial, and filed interrogatories, which the defendants were obliged to answer. But at the hearing the plaintiff's counsel asked the learned Judge in the Court below to add the administratrix as a co-plaintiff, which application, though opposed, was granted, as if authorized by s. 32 of the Code, and thereupon a decree was at once made for payment to the plaintiff and co-plaintiff, not only of the moneys secured by the promissory note, but also of all the costs of suit.

Against that decree the defendants have appealed, insisting that the learned Judge in the Court below had no authority to add the administratrix as co-plaintiff at the hearing, and at all events ought not to have directed the defendants to pay the

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costs of the suit; for if the addition of the co-plaintiff was necessary, then no costs should have been given up to the hearing; and if her presence was unnecessary, then, at least, the defendants ought not to have been directed to pay her costs, or the costs incidental to making her a party.

Technically I am of opinion that the Court below did not have power to add at the hearing the administratrix as a co-plaintiff; and of course, if the judgment of the Court below is technically wrong, the whole case of costs is open in appeal. In my opinion s. 32 of Act X of 1877 applies to a suit which is to some extent properly instituted, though partially defective; in other words, there is no jurisdiction at the hearing to add a plaintiff, unless the original plaintiff had some title to sue. It was strongly urged before us, that the original plaintiff, as sole heir of his father, was entitled to sue alone for the debt, or at least had some title to sue. But s. 2 of Act XXVII of 1860 enacts, that "no debtor of any deceased person shall be compelled in any Court to pay his debt to any person claiming to be entitled to the effects of any deceased person, or any part thereof, except on the production of a certificate, to be obtained in manner hereinafter mentioned, or of a probate or letters of administration, unless the Court shall be of opinion that payment of the debt is withheld from fraudulent or vexatious motives, and not from any reasonable doubt as to the party entitled."

In this case the plaintiff has not attempted to prove, nor is there any ground for saying, that the defendants withheld payment from fraudulent or vexatious motives. No demand was proved to have been made before suit, and before service of the summons an order for administration had been granted with the plaintiff's concurrence to another person. No offer of obtaining the concurrence of the administratrix was made before the hearing, and it appears that so far from evading payment, the defendants were taking steps to raise the money.

Section 27 of Act X of 1877 authorizes the Court to substitute or add the proper plaintiff when the suit has been instituted by a wrong person under a *bond fide* mistake; but even if there were a *bond fide* mistake in this case, it appears to me that, as the section does not contain the words "on or before the first hear-

ing," which appear in s. 32, the power given by the section ought to be exercised before the first hearing; and as the objection was taken in the written statement, it was mere perversity of the original plaintiff to wait until the hearing before he asked for the administratrix to be made a co-plaintiff.

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The order of the Court below being in my opinion technically wrong, the appellants would be entitled to have the decree reversed with costs in both Courts. But inasmuch as substantial justice was in fact done by the decree in ordering payment to the administratrix, I also should be willing, if the parties consent, and for the purpose of saving expense, to allow the decree to stand so far as it directs payment to the administratrix. But whether the parties consent or not, I think the plaintiff must pay the whole costs of suit and appeal, to be set off against the decree, if the parties elect to let the decree with the proposed modification stand.

Appeal allowed.

Attorneys for the appellants: Messrs. *Beeby and Rutter.*

Attorney for the respondent: Baboo *Brojonath Mitter.*

APPELLATE CIVIL.

Before Mr. Justice Pontifex and Mr. Justice McDonell.

DOOLEE CHAND AND OTHERS (DECREE-HOLDERS) v. OMDA KHANUM,
alias BABU SHUBIBU AND OTHERS (JUDGMENT-DEBTORS).*

1880
June 3.

*Mortgage Decree for Account and Sale—Taking of Accounts—Withdrawal of
Execution-Proceedings—Principle on which Accounts are to be taken,*

A mortgagee, who has obtained a decree for an account and sale, is not entitled to withdraw from the taking of accounts in his execution-proceedings, when those accounts appear to be going against him.

THE appellants in this case had obtained a decree for an account and for the sale of certain property mortgaged to

* Appeal from orders, Nos. 174 and 175 of 1879, against the order of G. F. Porter, Esq., Officiating Judge of Gyn, dated 7th June 1879, affirming the order of Baboo Matadin, Subordinate Judge of that district, dated the 30th August 1878.

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them by the respondents. But finding that, at the taking of the accounts, the balance was against them, they applied to the Subordinate Judge of Gya to allow them to withdraw from further execution-proceedings. The Subordinate Judge, on the 30th August 1878, whilst allowing them to stop proceedings, refused to permit them to withdraw or strike off the case until the accounts were settled.

The decree-holders appealed to the Judge of Gya, who confirmed the order of the lower Court, and dismissed the appeal.

The decree-holders then appealed to the High Court.

Baboo Mohesh Chunder Chowdhry and Baboo Nilmadhub Sen for the appellants.

Mr. C. Gregory and Baboo Prannath Pundit for the respondents.

The judgment of the Court (PONTIFEX and McDONELL, JJ.) was delivered by

PONTIFEX, J.—The main question in this appeal is, whether a mortgagee, who has obtained a decree for accounts and sale, is entitled to withdraw from the execution-proceedings when those accounts appear to be going against him. There is a subsidiary question, *viz.*, if he is not so entitled, upon what principles are the accounts to be taken between the parties?

Now we think, that the essence of foreclosure and redemption suits is, that in such suits each party is entitled to enforce his rights. A plaintiff claiming foreclosure is bound, upon the accounts being taken, if the balance is against him, to pay that balance. On the other hand, a plaintiff claiming redemption must submit to a decree for sale or foreclosure if he makes default in payment. Unless this were so, there would be a multiplicity of suits. To avoid this, it is necessary, under decrees for foreclosure or redemption, that the accounts between the parties should be settled and discharged. In this case, the plaintiff obtained a decree on the 12th May 1862 upon a mortgage-deed, and he claims that, previously to the mortgage-

to him, he held under the mortgagor, the predecessor in title of the defendants, a zur-i-peshgi lease, and he also claims, as I understand, that at the expiration, or soon after the expiration, of the zur-i-peshgi, the defendants themselves entered into another ticca arrangement with him. A question that has been repeatedly raised in this suit, and which has been before the High Court no less than four times, is, whether the plaintiff is to be treated as a mortgagee in possession in taking the accounts,—that is to say, whether the zur-i-peshgi deed and alleged ticcadari are to be disregarded.

At first, by some inadvertence in Mr. Justice Phear's judgment, it seems to have been laid down that he was to be treated as a mortgagee in possession; but, on a subsequent appeal, Mr. Justice Phear distinctly stated that, if that construction had been placed upon his judgment, it was what he never intended. Of course, if the mortgagee held possession under any contract of title distinct from his mortgage, he would be entitled to set up that title, and insist that his possession under that contract was distinct from his mortgage title, and that he could, during such possession, only be charged with rent payable under that distinct contract. Now, when the case came before Mr. Justice Phear on the 13th March 1875, a decree was passed by this Court, directing that certain accounts should be taken, and under the terms of that decree as it stands, the plaintiff would have to account as a mortgagee in possession. Although that decree has not actually been set aside, and although no decree has been made in its place, yet it clearly appears from the judgment of Mr. Justice Phear of the 28th July 1876, that it was not the intention of the Court that the account should be taken against the mortgagee as against a mortgagee in possession. It is therefore necessary for us now to do justice between the parties. We agree with the lower Court in thinking that the mortgagee is not entitled to withdraw from the taking of accounts in his execution-proceedings at his own will and pleasure. The decree of Mr. Justice Phear of the 13th March 1875 directed that the defendant, if a balance was due from him, should pay such balance to the plaintiff, and if, on the other hand, a balance was due from the plaintiff, he should pay such balance to the

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defendant; and that appears to us to be the proper principle upon which a decree should be made.

We therefore dismiss the appeal on the main ground which has been taken before us.

In sending back the case to the Court below, we think we ought to point out distinctly, and so as to prevent future litigation between the parties, the principles upon which the accounts should be taken. We are of opinion that an account should be taken half-yearly of the interest due from the mortgagor under the mortgage-deed, and that, from such half-yearly amounts of interest, should be deducted the rent payable but unpaid by the mortgagee during such half year under any contract for possession, separate and independent of the mortgage; and if, for any period the mortgagee was in possession, rent became due under any such separate or independent contract, during such period, he should be charged as a mortgagee in possession. The balance of interest half-yearly (if any) will not carry interest up to the date of the decree. But an account must be made up, as on the date of the decree of the 12th May 1862, of the principal and interest, after making such deductions as I have mentioned, due to the plaintiff at that time. Upon that aggregate amount interest will again be calculated at one per cent per mensem, and against the subsequent half-yearly accounts must be set off the amounts payable and unpaid by the mortgagee in respect of rent under any contract for possession, separate and independent of the mortgage; and for any period uncovered by such separate and independent contract, such a sum as should be charged against a mortgagee in possession.

The accounts being so taken, the mortgagor must pay the balance, if any, found due from him on such account, to the plaintiff, the mortgagee. On the other hand, if a balance is found due from the plaintiff, the mortgagee, to the defendant, the plaintiff must pay such balance to the defendant.

We think, in order to put a stop to further litigation between the parties, that, if any difficulty arises in carrying out this order, the parties should have liberty to apply direct to this Court. As the appellants have failed on the main point of their appeal, they must pay the costs of this appeal.

The record will be sent down at once, and the parties must carry in their accounts within six weeks of the arrival of the record in the Court below, with liberty for such Court to extend the time on a proper case being made.

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Appeal dismissed and case remanded.

PRIVY COUNCIL.

SIKOSHINATH GHOSE AND OTHERS (PLAINTIFFS) v. KRISHNA-SUNDERI DAS (DEFENDANT).

P. C.*
1880
July 7 & 8.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Hindu Law—Adoption among Sudras—Execution of Mutual Deeds—Actual giving and taking of Child.

Although it has been held that, in the case of Sudras, no ceremonies except the giving and taking of the child are necessary to an adoption, yet it is not to be taken for granted, that such giving and taking can be completed by the execution of mutual deeds without more; but, *semble*, that, according to Hindu usage which the Courts should accept as governing the law, the giving and taking in such an adoption ought to take place by the father handing over the child to the adoptive mother, the latter intimating her acceptance of the child in adoption.

In this case it was found on the evidence, that it was not the intention of the parties to complete the adoption by the mere execution of the deeds.

APPEAL from a decree of the High Court of Bengal (5th February 1878), confirming, except as to costs, a decree of the District Judge of Bhagalpore (8th February 1876), whereby the suit was dismissed.

The first appellant sued, in January 1875, to establish the fact of his adoption in 1864 by the respondent, the widow of Dwarkanath Ghose, who, before his death in 1863, had orally given to her power to adopt. The co-appellants were joined in the suit, having purchased a part of the estate claimed; and the object of the suit was to obtain a declaration of the right of the alleged adopted son to possession of the estate of Dwarkanath

* *Present*:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

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Ghose, to which, as his sole and sonless widow, Krishnasunderi, the respondent, had succeeded.

Dwarkanath Ghose having, by custom, the title of "Mohashoi," was a zemindar of considerable estate, and a principal person in the caste of "Uterarhi," or Northern, Kaists, residing near Bhagalpore in Behar. He left, besides his widow and heiress Krishnasunderi, two nephews, sons of a half-sister, Purnochandra Sing and Upendra Chandra Sing, who would, in the absence of an adoption by his widow, have been his heirs in remainder after her death. He also left a half-sister Bhagabatti, a childless widow, and an aunt, Shibasunderi, whose names were on the instruments of adoption.

To record the existence of the authority to adopt, as well as certain dispositions said to have been made by Dwarkanath Ghose of his property, to take effect after the adoption should have been completed, the respondent Krishnasunderi executed, on the 1st of October 1863, and shortly afterwards caused to be registered, an instrument called a "bidhanpatro," setting forth the above facts. The nephews in the same year obtained a decree on the strength of the gifts recited in the "bidhanpatro."

Towards the end of 1863, Krishnasunderi, with the assistance of her half-brother, Chandra Narain Sing, and of her brother Surjonarain, a pleader in the Bhagalpore Courts, selected the first appellant as a suitable boy to adopt. He was then Nogenendra Chandra Mitter, fourth son of Srinarain Mitter, brother of the mother of Chandra Narain Sing, resident at Malta in the Burdwan district; and he was aged about seven years. On the 30th Jeyt, or 11th June 1864, the two instruments, the "danpatro" and the "grahanpatro," on which the appellants relied, were executed at the widow's residence near Bhagalpore, and registered at Bhagalpore on the same day (1).

The only question material to this report is, whether the two instruments by themselves constituted a valid and irrevocable transfer of the appellant from one family to the other, so as to make him the adopted son of Dwarkanath Ghose.

(1) Translations of these documents will be found in 11 B. L. R., pp. 172, 173.

The Judge of Bhagalpore dismissed the suit, and that decision was upheld by the High Court (JACKSON and McDONELL, JJ.), on appeal.

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The plaintiff, therefore, brought the present appeal.

Mr. T. H. Cowie, Q. C., Mr. Branson, and Mr. Evans appeared for the appellants.

Mr. R. V. Doyne and Mr. Woodroffe for the respondent.

For the appellants it was contended that the deeds of giving and taking, executed in June 1864, were sufficient to effect the adoption; and that, on the evidence, a complete adoption had taken place. Reference was made to *Sreenurain Mitter v. Kishensoondery Dossee* (1) and *Indromoni Chowdhurani v. Behurilal Mullick* (2).

Counsel for the respondent were not called upon.

Their Lordships' judgment was delivered by

SIR J. W. COLVILLE.—The question in this case is, whether the plaintiff has been validly adopted as the son of Dwarkanath Ghose, who died on the 30th of June 1863, by his widow, the defendant. It is admitted that she had authority from her husband for that purpose, and the adoption is alleged to have taken place on the 11th of June 1864.

Their Lordships do not propose to go at any length into the facts of the case, which are fully and lucidly stated in the two able judgments that are the subject of this appeal. It is sufficient to refer to a few of them. It appears that the widow lost no time in seeking to carry out her husband's direction to adopt a son. A correspondence, which was carried on chiefly by Surjonarain Sing, her brother, who took the principal part in all these transactions, began in January 1864; from which it appears that, whatever unwillingness Srinarain, the natural father of the plaintiff, may have felt at first to give

(1) 11 B. L. R., 171; S. C., L. R., (2) L. R., 7 I. A., 24; S. C., I. L. J. A., Sup. Vol., 149. R., 5 Calc., 770.

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his son in adoption, had been overcome before the end of the following May. The record contains only the letters written by Surjonarain during this period; but from them it may be inferred that Srinarain, in one or other of his letters that are missing, had stipulated for the execution of deeds of gift and acceptance which, if witnessed, as was contemplated, by the reversionary heirs of Dwarkanath Ghose, would afford evidence against them of the adoption and of the authority under which it was made. It may also be inferred that, at one time, it was contemplated that the defendant should send persons to bring the boy, without his father, to her house at Bhagalpore from Mahta, his father's place of residence, in order that she might see him before adopting him. Ultimately, however, Srinarain himself accompanied the boy, and came to Bhagalpore on the 7th of June 1864; and it may be that there was at that time some notion in the minds of all the parties that the adoption would then take place. However this may be, it is an undisputed fact that the deeds upon the construction of which the determination of this appeal must now depend, were executed on the 11th of June 1864. It is, on the other hand, equally clear, that the boy, instead of remaining with the defendant in her house, went back with his natural father to Mahta on the following day, the 12th of June 1864. He afterwards returned to the defendant's house, together with his brothers, who at least were only there on a visit, in September 1864, whilst Srinarain was on a pilgrimage. The brothers went home in November, but the boy remained in the house of the defendant. There appears to have been on the part of the father some remonstrance as to this, or, at all events, the expression of a wish that the boy should be sent back to him; and accordingly the boy was sent back to his father's house in December 1864, as it was expressly stated in the letter which accompanied him on his return, agreeably to his father's order. After that period he never returned to the defendant's house. Further correspondence ensued, and ultimately, on the 25th of March 1865, Srinarain himself wrote a letter, in which, after stating the boy's repugnance to leave his own home, the repugnance probably being that of his mother to part with him, and the

general feeling of the family, he ends by saying; "In this I have no power, as I have already informed you in my previous letter; and now I positively inform you that you all, relinquishing this hope, in consideration of the future, for the preservation of the estate, should make dattak-grahan (accepting a son in adoption) or any other arrangement you think fit:" pointing evidently to the adoption of another child by the defendant.

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In this the defendant appears to have acquiesced; but it was suggested on her part that the deeds which are in question ought to be cancelled, in order to remove the cloud which would otherwise rest on the title of any other boy whom she might adopt. For nearly a year Srinarain seems to have thought that this was the right and proper thing to be done, and to have been willing to concur in it; but in March 1866, he, having probably been advised, during a visit he was then paying to Calcutta, that his right to do so was at least questionable, refused to do it, and determined to leave things as they were; not, however, even then insisting on the adoption as complete and irrevocable. Thereupon the suit which has been before their Lordships on a former occasion was brought by the present defendant, seeking to have those deeds cancelled. In the course of that suit the validity of the adoption came in question: the Courts in India pronounced against it, and decided that the deeds should be delivered up to be cancelled. On appeal to Her Majesty, their Lordships were of opinion that the suit was improperly brought, and could not be maintained, being one in the nature of a suit for a declaratory decree, and brought in the absence of the child said to have been adopted; and they finally dismissed it, leaving every question touching the validity of the adoption open (1).

So matters remained until the plaintiff came of age, and he then brought the present suit to enforce his rights as an adopted son.

The case made by him, and the case tried in the Courts below, was, not that he had a good title by adoption by virtue of the deeds in question alone, but treated the execution of those

(1) 11 B. L. R., 171.

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deeds as contemporaneous with the performance of all the ceremonies incident to an ordinary adoption. There was great conflict of evidence upon the case so set up; and ultimately both the Indian Courts, in extremely well-reasoned judgments, found that no such formal adoption, as was alleged, ever took place, and dismissed the suit. A suggestion, however, as appears at the end of the judgment of the High Court, was made by one of the counsel for the plaintiff, to the effect that, even if there had been no such formal adoption as was alleged, the deeds themselves operated as a complete giving and taking of the plaintiff; that that was all that was essential in the case of Sudras; and that the adoption was completed by virtue of the deeds alone.

Their Lordships, by their ordinary rule, are precluded from going into the correctness of the findings of the two Courts upon the fact of the formal adoption attempted to be proved. This has been fairly admitted by the learned counsel for the appellants at their Lordships' bar, who have accordingly argued only the latter point,—namely, whether the effect of the two deeds was not to make the plaintiff fully and completely the adopted son of Dwarkanath Ghose.

It seems to their Lordships that two questions arise upon this point: *first*, whether, according to Hindu law, an adoption can be effected, even amongst Sudras, by the mere execution, without more, of such instruments as those in question; and *secondly*, whether it was the intention of the parties, when they put their hands to those two instruments, that such should be the case, or whether the execution of them was not intended to be a mere step in the proceedings which were to result at one time or another in a complete and full adoption. Their Lordships will deal with the last of those questions in the first instance. †

The first thing that strikes them is the extreme improbability that it should have been the intention of the parties to make an adoption by the mere execution of the deeds. Yet that such must have been their intention, if there was then a complete adoption, follows from the findings of the Courts that nothing more was done, or, presumably, intended to be done. Such a

course of proceeding seems to be in the highest degree repugnant to the ordinary habits, feelings, and usages of two Hindu families, both of considerable respectability. That this is so is shown by the circumstance that the plaintiff has thought (as the father in the former suit thought) it necessary to set up a case of formal and full adoption, with all ceremonies, whether necessary or not necessary; being the case which has been negatived by the two Courts. Nor does it appear to their Lordships that the terms of the deeds are necessarily inconsistent with the finding of the High Court that such was not the intention of the parties. The words of the deed of acceptance, no doubt, are strong, and are, as translated, in the present tense. Those words, according to the translation on the present record, are these:—"I take in adoption Srinarain Nogendro Chandra Mitter, the second son of your third wife, Srimati Monmohini, with the consent of all, and according to rule and usage." In the record of the former case before their Lordships there is a somewhat different and more expanded translation of the same passage, the terms of which are:—"I do, with the prescribed rights and ceremonies, adopt as my son Nogendro Chandra Mitter, your second son by your third wife, Srimati Monmohini." The words "with the prescribed rights and ceremonies" are stronger than the words "according to rule and usage;" but even taking, as their Lordships do, the latter to be the correct translation, it seems to them that the words point to an adoption in the customary and formal manner, and to something being done *ultra*, the mere execution of those two instruments.

Great stress has been laid, by Mr. Branson, particularly upon the immediate registration of the deeds. But as to that, their Lordships think that, although the circumstance of registration, as well as that of the execution, of the deeds would, of course, be very cogent evidence upon the main issue which was tried in the case,—namely, whether there had been a formal and regular adoption,—and might, if the other evidence that was given upon that point had been nicely balanced, have been sufficient to turn the scale,—it is of far less weight upon the question whether it was the intention of the parties, without

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more, to treat the execution of the deeds as an adoption. It shows, no doubt, what is fully admitted, that both parties then supposed that the adoption would take place at some time.

Their Lordships, therefore, see no reason to differ from the conclusion to which the High Court came upon the whole case,—that it never was the intention of the parties that the deeds should operate in the manner contended for. That conclusion, they think, is very much fortified by the subsequent correspondence that took place; the mode in which the child was treated, going from one house to the other; and the clear willingness of the father at one time to treat the adoption as simply inchoate, and something which could be given up, so that the defendant might carry out her purpose of performing the wishes of her husband by adopting another child. The circumstance, moreover, which the Courts have laid great stress upon, that, on the occasion of Dwarkanath's *sradh*, the boy supposed to be adopted was not present, and took no part in the ceremony, is strongly confirmatory of the notion that all parties then considered that at that time the adoption was not complete, but remained, to some extent, still *in fieri*.

That being so, it is unnecessary for their Lordships positively to decide the first question,—namely, whether there can be, according to Hindu law and usage, an adoption simply by deed, and without that corporeal delivery and acceptance of the child which is almost universally treated as the essential part of an adoption in the *dattaka* form. They desire, however, to say, that they are very far from wishing to give any countenance to the notion that there can be such a giving and a taking as is necessary to satisfy the law, even in a case of Sudras, by mere deed, without an actual delivery of the child by the father. There is no decided case which shows that there can be an adoption by deed in the manner contended for; all that has been decided is that, amongst Sudras, no ceremonies are necessary in addition to the giving and taking of the child in adoption. The mode of giving and taking a child in adoption continues to stand on Hindu law and on Hindu usage, and it is perfectly clear that, amongst the twice-born classes, there could be no such adoption by deed, because certain religious ceremonies, the *datta*.

homam in particular, are in their case requisite. The system of adoption seems to have been borrowed by the Sudras from these twice-born classes; whom in practice, as appears by several of the cases, they imitate as much as they can: adopting those purely ceremonial and religious services, which it is now decided are not essential for them, in addition to the giving and taking in adoption. It would seem, therefore, that, according to Hindu usage, which the Courts should accept as governing the law, the giving and taking in adoption ought to take place by the father handing over the child to the adoptive mother, and the adoptive mother declaring that she accepts the child in adoption.

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For these reasons, their Lordships think that no ground has been laid for disturbing the judgment of the High Court; and they will, therefore, humbly advise Her Majesty to affirm that judgment, and to dismiss this appeal with costs.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Barrow and Rogers*.

Solicitor for the respondent: Mr. *T. L. Wilson*.

APPELLATE CIVIL.

Before Mr. Justice White and Mr. Justice Field.

CHATRAPUT SINGH (PLAINTIFF) v. GRINDRA CHUNDER ROY
AND ANOTHER (DEFENDANTS).*

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August 27.

Sale of Government Revenue-paying Lands—Purchaser's Liability.

Government revenue does not become due from day to day, but at certain specified times, according to the contract of the parties, or the custom of the district in which the lands liable to pay such revenue are situate. It is not, therefore, liable to apportionment; and the person who is the owner of a revenue-paying estate at a time when the payment of the revenue falls due, is the only person liable for its payment.

The purchaser of an estate which pays Government revenue, takes it subject to all revenue and cesses, whether in arrear or accruing.

* Appeal from Original Decree, No. 243 of 1879, against the decree of Baboo Sree Nath Roy, Subordinate Judge of Hooghly, dated the 5th July 1879.

1880 *Held* therefore, in a suit by a purchaser for a certain sum for Government revenue and cesses, which became due after the date of, though due for a period previous to, his purchase, which sum he alleged he had been compelled to pay to save his interest in the subject of his purchase, that he was not entitled to recover.

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THE facts of this case relevant to the report are stated in the judgment of the Court.

Baboo Sreenath Dass and Baboo Rashbehary Ghose for the appellant.

Baboo Mohiny Mohun Roy and Baboo Prosonno Gopal Roy for the respondents.

WHITE, J.—The appellant was the plaintiff in the lower Court, and that Court dismissed his suit without going into evidence. The question, therefore, to be determined upon this appeal is, whether in his plaint he stated a case which, if proved, would entitle him to the relief which he sought against the defendants. The following are the material allegations in his plaint:—That, on the 9th of December 1873, he purchased an eight-anna share of a large zemindari under a decree that was obtained against the defendants; that, after that date, a large sum of money became due in respect of the third quarter's Government revenue for the year 1878-79, and also in respect of the road cess and public works cess for the same quarter; that on the 13th January 1879, the last day for paying the same, he paid the entire amount into the Government treasury; that, prior to the date of his auction-purchase, he had no right in the property which he had bought; that the defendants, down to the 8th of December 1879, were owners of the mehal sold and entitled to realize rent from the tenants; and that he was compelled, in order to save his interest in the mehal, to pay the amount that so became due for revenue and cesses.

His plaint prays for a declaration that he is entitled to recover from the defendants a proportionate amount of the Government revenue, road cess, and public works cess payable in respect of the mehal from the 29th of September to the 8th

of December 1878, and for a decree for that proportionate amount.

It is admitted by the appellant that his title to the eight annas share of the zemindari dates from his purchase,—namely, the 9th December 1878, and that the revenue and cesses which he seeks to apportion, although accruing from an earlier date, did not become due until after the 9th of December 1878, when the eight annas share had, by virtue of the purchase, become vested in himself. It is also admitted by his pleader that the sale was not made under the revenue-sale law. Government revenue does not become due from day to day, but at certain specified times, according to the contract of the parties, or the custom which may prevail in the district. The same remark applies to the cesses mentioned in the plaint, which are payable along with, and under the same conditions as, revenue. Therefore the liability to pay revenue in this case was a liability which first became due after the appellant had acquired his title. As the payments did not become due until after he had become owner of the estate, and he bought under no special stipulation which allowed of the payments being apportioned, I am of opinion that the doctrines neither of contribution nor of apportionment apply, but that he is liable to discharge the whole amount of the payments, and cannot make the judgment-debtors pay any portion of them.

There is another view of the case presented by the lower Court, which to my mind seems also a sound one, namely, that, upon the facts alleged, the plaintiff must be held to have purchased at the auction the eight annas share of the mehal with all revenue and cesses that may be either due or accruing due at the time of his purchase. Revenue and the public cesses mentioned constitute a standing incumbrance and first charge upon the land subject to them. A man who purchases an estate which pays revenue and cesses to Government, knows that the estate is by the law chargeable with this revenue and cesses, whether in arrear or accruing, and that unless he pays the same he will lose his purchase. In the absence of any express stipulation to the contrary in the proclamation of sale, he must be taken to purchase the estate subject to the discharge of these liabi-

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lities. A purchaser can easily, and I have no doubt does, protect himself from these liabilities by taking them into account in estimating the value of what he is about to buy, and regulating his biddings accordingly.

The proposition is supported by authority. The lower Court refers to the cases of *Obhoj Chunder Bundopadhya v. Nilambur Mookerjee* (1) and *Sheikh Khoda Buksh v. Degumburee Dossee* (2); and we are also referred to another case decided by Mr. Justice Louis Jackson and Mr. Justice McDonell on the 20th January 1876, Special Appeal No. 706 of 1875. The cases of *Obhoj Chunder Bundopadhya v. Nilambur Mookerjee* (1), and *Sheikh Khoda Buksh v. Degumburee Dossee* (2), although not cited in the judgment of Mr. Justice Jackson, are yet cited in the judgment of the lower Court then under appeal, and are approved of by the High Court.

The appeal is dismissed with costs.

FIELD, J.—In this case the plaintiff purchased a moiety of a revenue-paying estate at a sale held in execution of a decree. The date of the sale was the 9th December 1878; and it is admitted on both sides that the case is governed by the Full Bench decision in *Bhyrub Chunder Bundopadhya v. Soudamini Dabee* (3)—that is to say, that the plaintiff's title accrued from the date of sale,—namely, the 9th December 1878. After the date of sale the judgment-debtor made objections, and the sale was not confirmed until the 10th March. Meanwhile an instalment of Government revenue became payable on the 13th January 1879; and this, together with the road cess and public works cess, amounting in all to Rs. 15,833 annas 12, was paid by the plaintiff.

The ground upon which the plaintiff seeks to recover from the defendants their share of this sum, is set forth in the 4th paragraph of the plaint in the following words:

"As the defendants were owners of the mehal sold and were entitled to realize rent from the tenants of that mehal from the 29th of September 1878, the first day of the aforesaid third

(1) W. R. (1864), 73.

(2) *Id.*, 207.

(3) I. L. R., 2 Calc., 141.

quarter up to 8th December, and as they held possession thereof during that time, and as the plaintiff had no right to realize the rent of the period antecedent to his auction-purchase, the defendants are bound to pay the collectorate revenue and the road cess and public works cess of the above period."

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In other words, the plaintiff contends, that as the defendants were in receipt of the rents and profits of the estate up to the 8th December 1878, they ought to pay the Government revenue and other outgoings up to that date. At first sight it does appear somewhat inequitable that the person who has received the profits and rents should not by law be compelled to pay the outgoings; but I think there can be no doubt that upon the authorities we are concluded from making any other decree in this case than that which has been made by the lower Court. There is no law providing for the apportionment of Government revenue in such cases. According to the law of landlord and tenant rent is not apportionable in these provinces, and the defendants would not therefore be entitled to have the rents payable by the tenants apportioned so as to entitle them to recover exactly the rents due up to the 8th December 1878. The principle upon which the apportionment of revenue is claimed would not, therefore, be supported by the apportionment of the rent.

If this be regarded as a suit for the recovery of money paid to the defendants' use, there must be either an express or implied promise on the part of the defendants to pay that money. That there was any express promise has not been contended, and the circumstances are wanting from which a promise could be implied. The law under certain circumstances implies a promise when money is paid by A which B was lawfully bound to pay. In the case before us, it is impossible to say that B was lawfully bound to pay this money. According to the revenue law of these provinces, the estate must first have been sold for the realization of Government revenue due thereupon, and B, or the defendants in this case, could have been compelled to pay this money only if, after the estate had been sold, the arrears of Government revenue had not been realized from the sale-proceeds. It is not contended, and there is no evidence, that, if

1880 the estate had been sold in this instance, the revenue would
 CHATRAPUT not have been realized from the sale-proceeds; and, therefore,
 SINGH that the personal liability of the defendants would have arisen.
 v. I think, therefore, that no grounds exist from which a promise
 GRINDRA on the part of the defendants to pay this money can be implied.
 CHUNDER
 ROY. I concur in dismissing the appeal.

Appeal dismissed.

PRIVY COUNCIL.

P. C.*
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July 13 & 14

RAJRUP KOER (PLAINTIFF) v. ABUL HOSSEIN AND OTHERS
 (DEFENDANTS).

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Limitation Act (IX of 1871), ss. 24, 27; sched. ii, art. 31, part v—Presumption of Title founded on long continued User—Easement—Obstructing a Watercourse—Continuing Act of Wrong.

More than twenty years, and possibly fifty or sixty, before suit, the plaintiff's ancestors and predecessors in estate had constructed and used a *páin*, or artificial watercourse, on the defendants' land, making compensation to them. The *páin*, by a channel at one part of its course, contributed to the water in a *tál*, or reservoir, belonging to the defendants; and by a channel at another part, took the water which overflowed from the *tál*, after the defendants had used as much of the water therein as they required. Less than twenty years before the suit, the defendants, without authority, obstructed the flow of water along the *páin* in several places. The Courts below differed as to whether some of these obstructions had not been made more than two years before the suit, the rest having been made within that period.

Held, that the provisions of Act IX of 1871, a remedial Act, and neither prohibitory nor exhaustive, did not exclude, or interfere with, the acquirement of rights otherwise than under them. A title might be acquired under that Act by a person having no other right at all; but it did not exclude, or interfere with, other titles and modes of acquiring easements. And s. 27, by allowing a user of twenty years, if exercised until within two years of suit, under the conditions prescribed, to give, without more, a title, did not prevent proof of an easement founded on another title independently of the Act. Such a long enjoyment as the plaintiff had proved should be

* *Present*:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, and
 SIR R. P. COLLIER.

referred to a legal origin, and the long user of the *páin* and of the superfluous water of the *tál*, afforded evidence giving rise to a presumption that a grant, or an agreement, had been made creating an easement. Although, on the assumption that some of the obstructions in question had existed for more than two years before the suit, the plaintiff might not have shown a right under Act IX of 1871, s. 27, yet he did not require its aid.

Held also, that such obstructions being continuous acts, as to which the cause of action accrued *de die in diem*, Act IX of 1871, sched. ii, part v, cl. 31, fixing two years from the date of the obstruction as the period of limitation "for obstructing a watercourse," did not preclude a suit complaining of obstructions though made more than two years preceding the date of the commencement of the suit.

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APPEAL, by special leave, from a decree of a Division Bench of the High Court of Bengal (23rd February 1877), reversing a decree of the Subordinate Judge of Gya (17th August 1875), and restoring a decree of the Sudder Munsif of Gya (26th August 1874).

In January 1874, this suit was brought by Maharaja Ramkissen Singh, Raja of Ticari, in the Gya district, against the respondents, who were the owners of a village, Mouza Mora, in the neighbourhood of a zemindary, named Mehal Sunaut Parwariya, belonging to the Raja. Mouza Mora was situate between the Raja's zemindary and the commencement of a *páin*, or artificial watercourse, which brought water from a stream called the Phalgu Naddee to the Raja's Mehal. This *páin*, named Páin Desain, had been made by the Raja's ancestors on lands belonging to Mouza Mora, and on its course over the lands of that village towards Mehal Sunaut Purwariya, it was connected with a *tál*, or reservoir, which also was within the boundary of Mouza Mora.

The plaintiff claimed a declaration of his sole right to Páin Desain, and to the use of the water in the *tál*. He also claimed an order for the closing of openings in the *páin* recently made by the defendants for the draining off of water on to their lands; and for restraining them from interfering with sluices which regulated the flow of water out of the *tál*.

The defendants maintained that the water in the *tál* belonged to them, and that the plaintiff had not the sole right to the use of Páin Desain; that the openings and obstructions complained

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of were of long standing, and that the suit for their removal was barred by limitation.

The Sudder Munsif of Gya held, that the right to the use of the *páin* belonged to the plaintiff, and that the defendants had the right to the water in the *tál*, excepting the overflow, to which the plaintiff was entitled. He ordered, that all the openings made by the defendants in the *páin*, twelve in number, should be closed, except two, numbered 3 and 10, as to which he held the suit was barred by art. 31, sched. ii, Act IX of 1871, they having been in existence for more than two years before the suit was brought.

Both parties appealed to the Subordinate Judge of the district, who modified the decision of the Munsif in favor of the plaintiff, holding that the two years' limitation did not apply to the claim. Whilst proceedings were pending in the High Court, to which both parties appealed, the Raja died, and the present appellant was substituted for him on the record. The judgment of the High Court (JACKSON and McDONELL, JJ.) was as follows :

“The questions before the Court in this case are not unlike those which came before this Bench, at least before myself and my colleague Mr. Justice Glover, in 1870, in a case which is reported in 14 Weekly Reporter, page 349 (1), with this exception, that the position of parties is reversed. The plaintiff here is the owner of a *páin*, which traverses the land of the defendants. It appears to me, that it is scarcely an adequate description of the plaintiff's right in this case to say, that he has a bare easement or right to pass water over the defendants' land for the purpose of irrigating his own. The evidence shows, and the Courts appear to have found, that the *páin* was constructed by the ancestors of the plaintiff a great many years ago, possibly fifty or sixty years, certainly more than twenty years, for the purpose of irrigation: and there is part of the evidence which indicates that such construction was accompanied with certain advantages on the part of the defendants, which compensated them for any injury or inconvenience caused by the construction of the *páin*. In that state of things it seems that the defendants have,

at various times within the last few years, made a number of openings in that *páin*, for the purpose of drawing water, to the injury of the whole village. In this state of the facts, what we stated in the case above cited would apply, and we think that if the defendants were to be at liberty, without the plaintiff's consent, to construct a number of openings, and thereby seriously diminish the supply of water carried through the *páin* to the plaintiff's mouza, that would cause serious disturbance, and the plaintiff would be most wrongfully injured thereby. But to this state of the rights of the parties we have to apply the provisions of the Limitation Act; and we find that the plaintiff, in order that he may obtain relief in respect of an infringement of his easement, must come into Court within two years from the time that such infringement took place. The Munsif found, and it appears to us on very good grounds, that, as regards two of the openings from which the plaintiff complained that he sustained injury, they were in existence much more than two years before the commencement of the suit. Of course, the Subordinate Judge might, if the evidence permitted it, come to a different conclusion upon that part of the case, and the respondents' vakeel suggests that he did intend to do so by the use of these words—'With reference to the *dhonga* and *khúnd*, the Munsif has referred to the papers filed by the plaintiff, but those papers do not refer to the *dhonga* and *khund* in particular;' but we do not think that, in these words, the Subordinate Judge meant to reverse the finding of the Munsif on a question of fact, for, after the remark which he there makes, he goes on to dispose of part of the case on different grounds by, as is admitted before us to-day, a misapplication of the law of limitation. If we thought that there was any ground for coming to a different conclusion upon this fact, we should have been inclined to remit the case back; but we are satisfied that the Munsif's finding on this point is unassailable. Concurring, therefore, in the general view taken by the Court below of the rights of the parties, and being of opinion that the decision of the Munsif is correct as regards the *khund* and the *dhonga* mentioned by him, and being also of opinion that the cross-appeal filed by

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1880 the plaintiff in regard to the use of the *tal* has no force, we
 RAJRUP think that the judgment of the lower Appellate Court, so
 KOER much as varies the judgment of the Munsif, must be set aside,
 v. and that the Munsif's decision must be restored."
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From this decision the plaintiff appealed.

Mr. *Woodroffe* for the appellant.

Mr. *C. W. Arathoon* for the respondents.

For the appellant it was contended that the law relating to title by prescription had not been correctly applied, and that there had been misdecision on the merits. Title was to be presumed after long and undisturbed enjoyment, such as the plaintiff had shown in the continuous user of the *páin* for fifty or sixty years. The *páin*, also, had been originally constructed by the plaintiff's ancestors, from whom he had inherited the right to it, and compensating advantages had been conferred on the defendants' village. Documentary evidence, extending back to 1830, had been referred to. Atter all the above, the plaintiff should have been found entitled to the *páin*, independently of the rules relating to prescription in Act IX of 1871. It was also argued that, as insufficient weight had been given to necessary presumptions, and as the finding of the Subordinate Judge in regard to obstructions 3 and 10 had been misread by the High Court, a general modification of the decree was required. On the questions of law, to which it was intimated that Mr. *Woodroffe's* argument must be limited, it was contended, that neither the plaintiff's title, nor his consequent right to the removal of all the obstructions, failed, even supposing that all the conditions in s. 27 of Act IX of 1871, in order to prove an easement, had not been satisfied. That Act, as its preamble stated, provided "rules for acquiring ownership by possession;" but it repealed no law under which title existed independently of it. On ancient user being established, as it had been in this case, the presumption arose that such user was of right, and was lawfully founded on title. On this point were cited *Gooroopershad Roy v. Bykunto Chunder Roy* (1)

and *Mahomed Ali v. Jugulram Chandra* (1). But even if the plaintiff's title, and his claim to the removal of the obstructions, rested on the Act, it still was unnecessary to consider whether or not any of the obstructions had been in existence for more than two years before the commencement of this suit, when certainly none of them had been in existence for twenty years. Obstructions did not amount to legal "interruption" of the exercise of a right, unless submitted to or acquiesced in for a year by the owner after notice to him, according to the 'explanation' given in s. 27 of Act IX of 1871. On this point *Alimooddeen v. Wuzeer Ali* (2) was referred to; and on the corresponding provisions of the English Statute, 2 and 3 Will. IV, c. 71, *Flight v. Thomas* (3) was cited. It had not been shown that the violation of the plaintiff's right had been accompanied by the submission which s. 27 contemplated, so that the plaintiff's right of suit was complete under the Act if he resorted to it. Lastly, cl. 31 of part v of the sched. ii to Act IX of 1871 had no application to this claim. That section must be read as governed by the provisions of s. 24 of the Act relating to continuous acts, such as were the acts of obstructing the flow of water from the *tál*, and along the *páin*. The analogous rule of English law was laid down in *Gillon v. Boddington* (4) and *Whitehouse v. Fellowes* (5), showing that in such a case there was a cause of action arising every day that the obstruction was continued. As regards damages, cl. 31 might operate to limit the amount recoverable, but the cause of action in this suit would accrue day by day during the maintenance of the obstructions, until twenty years should have expired; upon the expiration of which period, other rights would have arisen in favor of the opposite party.

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Mr. C. W. Arathoon, for the respondents, having reviewed the position of the parties in regard to previous litigation and disputes about the subject of this claim, and having pointed out

(1) 5 B. L. R., App., 84; S. C., 14 (3) 10 Ad. & E., 590; S. C. on W. R., 124. appeal, 8 Cl. and F., 231.

(2) 23 W. R., 52.

(4) 1 Ryan & Moody, 161.

(5) 30 L. J., C. P., 305.

1880 that some of the obstructions were of long standing, argued, that
 RAJRUP rights on either side, long contested, had resulted in the partial
 KOER use of the *páin* by the defendants for their own purposes. The
 v. use of the *páin* by the defendants for their own purposes. The
 ABUL rights of the respondents in the *tál* required the protection that
 HOSSEIN. had been given to them, in the decree. The survey maps
 having been referred to in connection with the above, the object
 of averting inundation was also shown to enter into the question
 of the rights of the parties. It was, however, contended that
 the facts had been found in the Indian Courts without any such
 difference of decision as rendered them still open to question.
 On the application of Act IX of 1871 it was argued, that the
 judgments of the High Court and the Sudder Munsif were
 correct, and *Juggessur Singh v. Nundlall Singh* (1) was cited.

Mr. Woodroffe in reply.

Their Lordships' judgment was delivered by

SIR M. E. SMITH.—This was a suit brought by Maharaja Ramkissen Singh Bahadur to establish an asserted right to a *páin* or artificial watercourse, and also to a *tál*, or reservoir, and the water flowing from them through another estate to his own, and to obtain the removal of certain obstructions in the *páin*. The Maharanee, the present appellant, is his widow. Several questions arising in the suit have been finally disposed of in the Courts below, leaving for the decision of their Lordships the main question, which arose on the special appeal before the High Court, as to the effect of the Statute of Limitations upon two of the obstructions complained of.

The facts necessary to raise this question may be shortly stated: The Maharaja and his ancestors were the owners of Mehal Sunaut Parwariya, in the district of Gya; and the defendants were the owners of an estate called Mouza Mora. The system of irrigation claimed by the plaintiff embraces an artificial *páin*, which is fed by a natural river at a point to the south of the defendants' mauza. The *páin*, which runs from the south in a northerly direction, after traversing other estates, enters Mouza Mora, and runs through it, and afterwards through other lands

to the defendants' mehal. There is, branching from the main *páin*, a channel or smaller *páin*, which helps to feed the *tál* claimed by the plaintiff. The *tál* lies near the foot of some hills, and is fed partly by the water which runs through the channel connected with the *páin*, and partly by the rainfall from these hills. It appears that there is another channel in a lower part of the *tál*, which runs from it and joins the *páin* at a point near a bridge, described in the Munsif's map. It is said there were doors or sluices in the bridge by which the flow of the water had been, to some extent, regulated, but no question now arises with regard to them. The obstructions complained of were twelve in number, consisting of dams, cuts, and other modes of obstructing or diverting the water from the *páin*.

The general result of the litigation below is, that the plaintiff succeeded in establishing his right to the *páin* as an artificial watercourse, and to the use of the water flowing through it, except that which flowed through the branch channel; but failed to establish his right to the water in the *tál*, except to the overflow after the defendants, as the owners of Mouza Mora, had used the water for the purpose of irrigating their own land. That, generally stated, is the result of the finding as to the rights of the plaintiff.

It was found in the Courts below that all the obstructions were unauthorised; and the plaintiff has succeeded below as to all the obstructions, except two, which are numbered No. 3 and No. 10. No. 3 is a *khund*, or channel cut in the side of the *páin* at a point below the bridge which has been spoken of. No. 10 is a *dhonga*, also below the bridge, and consists of hollow palm trees so placed as to draw off the water in the *páin* for the purpose of irrigating the defendants' land. No question arises here as to the fact that those two works are an interruption of the plaintiff's right; and he would be entitled to succeed as to them, as he has succeeded as to the other obstructions, unless he is prevented from so doing by the operation of the Statute of Limitations.

The Munsif has found that the Statute opposes a bar to his claim. The Subordinate Judge was of a different opinion, and reversed the Munsif's decree. On special appeal to the High Court, the Judges of that Court concurred with the Munsif,

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and reversing the decrees of the Subordinate Judge, affirmed the Munsif's judgment.

Before adverting to the Statute, it is necessary to see upon what facts the Courts based their decisions. It appears that the Munsif found that these obstructions had been made more than two, but less than twenty, years before the institution of the suit. The Subordinate Judge found, that the two obstructions were recently made; and it may be inferred from his disagreeing with the inferences which the Munsif drew from certain accounts which were produced, and the comments he made upon the latter's judgment in dealing with those accounts, that he meant to overrule the finding of the Munsif that the obstructions had existed for two years. If they had not existed for that period, no question on the Statute can arise. The High Court, without going into the facts, construed the judgment of the Subordinate Judge as not overruling the Munsif on the question of fact, and therefore they assume that these obstructions had existed for more than two years before the institution of the suit.

Their Lordships are disposed to dissent from the view of the High Court, and to come to the conclusion that the Subordinate Judge really did intend to overrule the finding of the Munsif upon the fact of the length of time during which these obstructions had existed; but, assuming the fact to be as the Munsif and the High Court have regarded it,—namely, that these obstructions had existed for more than two, but for less than twenty years, they think that no provision of the Statute of Limitations interferes with the plaintiff's right to recover in respect of them.

The Limitation Act, No. IX of 1871, contains two sets of provisions, which are in their nature distinct. One relates to the limitation of suits, and prescribes the limitation of time for bringing suits after the right to sue has arisen. The other set relates to the manner of acquiring title and rights by possession and enjoyment. The latter provisions are contained in Part IV of the Act, and are introduced under the heading "Acquisition of ownership by possession." They enact a mode of acquiring ownership by possession or enjoyment. Section 27 is as follows: "Where any way or watercourse, or the use of any water or any other easement (whether affirmative or negative), has been

peaceably and openly enjoyed by any person claiming title thereto, as an easement and as of right, without interruption and for twenty years, the right to such access and use of light or air, way, watercourse, use of water, or other easement, shall be absolute and indefeasible." Then there is this provision, on which the judgment of the Munsif certainly proceeded, though whether the High Court proceeded on that, or on the part of the Act which relates to limitation properly so called, may be open to doubt. The clause is this: "Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested."

On the assumption of fact made by the Munsif that these obstructions had existed for more than two years before the suit, he might be right in finding that the plaintiff had not had peaceable enjoyment for twenty years ending within two years before the institution of the suit; and, therefore, that the plaintiff had acquired no title by virtue of this Statute. The object of the Statute was to make more easy the establishment of rights of this description, by allowing an enjoyment of twenty years, if exercised under the conditions prescribed by the Act, to give, without more, a title to easements. But the Statute is remedial, and is neither prohibitory nor exhaustive. A man may acquire a title under it who has no other right at all, but it does not exclude or interfere with other titles and modes of acquiring easements. Their Lordships think that, in this case, there is abundant evidence upon the facts found by the Courts for presuming the existence of a grant at some distant period of time. The result of the facts which appear in evidence, and the effect of the judgments of the Munsif and of the Subordinate Judge, are thus stated in the judgment of the High Court: "The evidence shows, and the Courts appear to have found, that the *pâin* was constructed by the ancestors of the plaintiff a great many years ago, possibly fifty or sixty years—certainly more than twenty years—for the purpose of irrigation; and there is part of the evidence which indicates that such construction was accompanied with certain advantages on the part of the defendants, which compensated them for any injury or incon-

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1880 — convenience caused by the construction of the *páin*." This being
 RAJENDR — an artificial *páin* constructed on the land of another man at the
 KOER — distant period found by the Courts, and enjoyed ever since, or at
 v. — least down to the time of the obstruction complained of, by the
 ABUL — plaintiff and his ancestors, any Court which had to deal with
 HOSSEIN. — the subject might, and indeed ought to, refer such a long enjoyment to a legal origin, and, under the circumstances which have been indicated, to presume a grant or an agreement between those who were owners of the plaintiff's mehal and the defendants' land by which the right was created. That being so, the plaintiff does not require the aid of the Statute; and his right, therefore, is not in any degree interfered with by the provision in the 27th section, upon which the Munsif decided.

This being their Lordships' view of the case, it becomes unnecessary to consider the argument addressed to them by Mr. Woodroffe upon the effect of the clause in the same 27th section under the head 'explanation,' which defines what is to be considered an interruption. Nor it is necessary to consider the doctrine laid down in *Thomas v. Flight* (1) in the Court of Exchequer Chamber, and afterwards in the House of Lords, with reference to a similar clause in the English Prescription Act.

Their Lordships have already observed that it appears to be open to doubt whether the High Court did not base its judgment on the part of the Statute which relates to limitation properly so called,—namely, on art. 31 of Part V. of the second schedule, which limits the time for bringing suits for the obstruction of watercourses to two years "from the date of the obstruction." The judgment contains this passage: "We find that the plaintiff, in order that he may obtain relief in respect of an infringement of his easement, must come into Court within two years from the time when such infringement took place." If the Judges really meant to apply the limitation of art. 31 above referred to, their decision is clearly wrong: for the obstructions which interfered with the flow of water to the plaintiff's mehal were in the nature of continuing nuisances, as to which the cause of action was renewed *de die in diem*, so long as the obstructions causing such interference were allowed to continue.

(1) 10 Ad. & E., 590; S. C. on appeal, 8 Cl. and F., 231.

Indeed, s. 24 of the Statute contains express provision to that effect. For these reasons, their Lordships are of opinion that the judgment of the High Court with regard to the two obstructions in question cannot be sustained, and that the judgment of the Subordinate Judge as regards these obstructions ought to be restored.

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There remains to be noticed the contention raised as to the *tál*. Mr. Woodroffe has strongly argued that the findings as to the *tál* in favor of the defendants are wrong; and he further endeavoured to show by reference to the judgments that they were not conclusive on that part of the case. Their Lordships, however, find, that there are distinct judgments of the Munsif and of the Subordinate Judge to the effect, that the defendants had a proprietary right in the *tál* and to the use of the water in the *tál*, and that the plaintiff had no right to the *tál* or to the water in it, except to so much as flows out of it in a natural course to the plaintiff's *páin*. To that overflow they considered him to be entitled, but to no more. Their Lordships, therefore, have come to the conclusion that, this case being heard only on special appeal, it is not open to the appellant to impeach those findings; and that, therefore, so far as this part of the case is concerned, they must dismiss the appeal. The result is, that their Lordships will humbly recommend Her Majesty, that both the decrees of the High Court be reversed; that the decree of the Subordinate Judge be affirmed; and that the decree of the Munsif be modified in accordance therewith.

Mr. Woodroffe desired that the language of the Munsif's decree with regard to the enjoyment of the water in the *tál* should be modified. Their Lordships, having considered what was addressed to them on that subject, and the language of the Munsif's decree, are not disposed to interfere with it. The plaintiff having claimed the whole of water in the *tál*, they think that the Munsif had to determine upon that claim; and that having given only a qualified enjoyment of the water to the plaintiff, it was necessary, in order to arrive at what that qualified right was, to define the prior right of the defendants. He has done this in language which their Lordships, perhaps, would not have used themselves, but which is sufficiently intelligible.

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The Munsif having gone to the spot, and having taken apparently great pains with his decision, their Lordships are not disposed to alter or interfere with this part of his decree. Substantially it amounts to a declaration that the defendants are entitled to use the water of the *tál* for the irrigation of their estate. If this should be wastefully or improperly done with reference to the right declared to belong to them, it may be the subject of a future inquiry. Their Lordships will, therefore, humbly advise Her Majesty to the effect above stated.

Their Lordships have considered the question of costs. The plaintiff having failed as to part of his appeal, they will follow the course which the High Court took, and give no costs to either party.

Appeal allowed.

Solicitors for the appellant: Messrs. *Henderson & Co.*

Solicitor for the respondents: Mr. *T. L. Wilson.*

APPELLATE CIVIL.

Before Mr. Justice Pontifex and Mr. Justice McDonell.

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RUN BAHADOOR SINGH (PLAINTIFF) v. LUCHO KOOR
(DEFENDANT).*

Res judicata—Want of Jurisdiction as to Valuation of Suit—Subsequent Suit between the same Parties—Intervenors—Competent Court—Rent Suits.

A judgment of a Court not competent to try the case in which the judgment is pleaded as *res judicata*, must, nevertheless, be held to be the judgment of a Court of competent jurisdiction within the rule as laid down in the maxim *nemo debet bis vexari pro eadem causa*, and s. 13 of Act X of 1877; more especially where the first suit is tried, decided, and affirmed on regular appeal by a Subordinate Judge, who would have been competent to decide the suit (had it been brought before him) in which the judgment was pleaded.

The rule of *res judicata* ought to be held to apply to judgments in rent-suits, at least until interventions in such suits are authoritatively prohibited.

Costs not allowed where the plea of *res judicata* was not raised until after all the evidence had been taken.

* Appeal from Original Decree, No. 144 of 1878, against the decree of Baboo Matadin, Roy Bahadoor, Subordinate Judge of Gya, dated the 21st January 1878.

IN this case, the plaintiff stated that he and his brother Murlidhur were, prior and up to the date of the latter's decease, members of a joint undivided Mitakshara family; and that he, on the death of his brother, became his heir. The defendant, who was the widow of Murlidhur, contended that, at the death of her husband, the brothers were separate, and therefore that she was entitled to succeed to her husband. The defendant had taken out a certificate under Act XXVII of 1860 to collect the debts of her husband, and had dispossessed the plaintiff from certain properties, and the plaintiff therefore brought this suit for possession. The circumstances of the case were as follows:—

In 1268, one Bishen Singh was the head of the family, his two sons being the plaintiff and his younger brother Murlidhur. Bishen Singh was possessed of self-acquired property only, consisting of three *milkiut* mouzas and a mukurari held under the Tikari Raj of part of another mouza taken benami in the names of Mutra Rawut and Dukhoo Rawut. This mukurari tenure was sold and purchased by a representative of the Tikari Raj some time between 1268 (1861) and 1275 (1868); a subsequent mukurari of the same land was regranted by the representative of the Tikari Raj in 1275 benami in the names of Banwari Rawut and Kewal Rawut, and from a recital in this mukurari it appeared, that the prior mukurari was sold, not for arrears of rent, but in execution of a decree in a suit against Bishen Singh. At some time between 1268 and 1270 (1863), Bishen Singh disappeared from his house, and it was set up for the first time in this suit, that the cause of his disappearance was, that he became a fakir; other totally different reasons had been put forward in prior proceedings during the life of Murlidhur. The plaintiff contended that these mukuraris were taken benami for Bishen Singh, whilst the defendant contended that the mukurari deeds were intended to be given, and were, benami for the brothers separately.

After all the evidence had been taken, the defendant set up for the first time the plea of *res judicata*, which, she stated, was made out under the following circumstances, *viz.*:—some time after Murlidhur's death, *viz.*, in July 1874, and contemporaneously with the defendant's application for a certificate to

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collect debts as heir of Murlidhur, she instituted a suit against one Goneshi Roy, a tenant, for the sum of Rs. 53-6-10, due as rent in respect of eight annas of his holding, on the allegation that the food and transactions of Murlidhur were separate. Into that suit Run Bahadoor intervened by petition of objection dated the 13th of August 1874, asserting that Murlidhur was, till his death, joint with him, and asking to be made a defendant. Accordingly an order was passed that he should be made a defendant; and, on the 4th of September 1874, he filed his written statement as a defendant in the rent-suit.

In that written statement he insisted that Murlidhur died in a state of commensality; that the mouza, of which the rent was claimed, and several other villages obtained by Bishen Singh, the father, were held in the fictitious names of their servants; that no division and separation of family were ever made in any way; and that he, Run Bahadoor, since Murlidhur's death, had been in possession and occupation of the whole of the property left by Murlidhur. On the other hand, the defendant, on the 14th September 1879, filed a petition in a certificate case, in which she alleged an absolute separation in 1270.

The rent-suit was heard before a Munsif, who, in his judgment dated the 6th of January 1875, after stating Run Bahadoor's allegation that he and Murlidhur were joint, and that Murlidhur died during the community of interest, raised the second issue as follows:—

“Whether, before this, the plaintiff or her husband realized the rent of eight annas separately; or whether the plaintiff's husband has been receiving the rent in his lifetime jointly with Run Bahadoor, and since his death Run Bahadoor alone received the rent of sixteen annas?”

Upon that issue the Munsif proceeded to adjudicate on the title to the entire mukurari, under which was held the mouza, for the rent of which the suit was instituted; and his conclusion was, that the brothers were in possession separately, and that “the two brothers were separate,” arriving at this conclusion on almost precisely the same documentary evidence as was filed in the present suit, and to a great extent on the oral

evidence of the same witnesses as were examined in the present suit.

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On the 28th of August 1875, this judgment was affirmed on appeal by the Subordinate Judge, holding that Bishen Singh, the father, "took the mokurari in the names of Banwari Rawut and Kewal Rawut in equal halves;" a fact which the Subordinate Judge held sufficiently indicated "that a moiety was obtained for the benefit of his son Run Bahadoor, and a moiety for that of his other son Murlidhur;" and that "the evidence of Moharaneer Inderjeet Koer, Moharajah Ramkishen Singh, and other witnesses examined, satisfactorily proved that Run Bahadoor and Murlidhur were till (at) the death of the latter separate, each carrying on his affairs, and paying revenue of his share of the mouza apart from the other."

The Subordinate Judge in the present suit found that a separation had been come to between the brothers prior to the death of Murlidhur, and that the defendant had continued in possession of the properties left by her husband; he, therefore, overruling the plea of *res judicata*, dismissed the plaintiff's case with costs.

The plaintiff appealed to the High Court, and the defendant put in a cross-appeal on the question of *res judicata*.

The *Advocate-General* (Mr. Paul, with him Mr. C. Gregory, Baboo Mohesh Chunder Chowdhry, Baboo Srish Chunder Chowdhry, and Baboo Ram Chunder Mittra) for the appellant.—As to the question of *res judicata*, the respondent will, no doubt, rely on *Krishna Behari Roy v. Brojeswari Chowdranee* (1); but I contend that case does not apply, as the property claimed in our case is not identical with that in the rent-suit. The rent-suit related only to one mouza held under one of the mokuraris. In the rent-suit the present plaintiff came in as an intervenor, and that suit is not an estoppel to the present suit; see *Chunder Coomar Mundul v. Nunnee Khanum* (2), which approves of the case of *Aradhun Dey v. Golam Hossein* (3). The Munsif was competent to try the rent-case, as that was

(1) L. R., 2 I. A., 283; S. C., I. L. (2) 11 B. L. R., 434; S. C., 19 W. R., 1 Calc., 144. R., 322.

(3) 8 W. R., 487.

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only of the value of Rs. 1,000; but he would not be competent to try the present suit for possession of the mouza in respect of which the rent had been claimed, and therefore his judgment in the rent-suit ought not to have the effect of *res judicata* in the present case, which he is not competent to try—*Mussamut Edun v. Mussamut Bechun* (1). [PONTIFEX, J.—*Flitters v. Allfrey* (2) shows that a judgment of a Court not competent to try the case in which the judgment is pleaded as *res judicata*, must, nevertheless, be held to be the judgment of a Court of competent jurisdiction. On the question of an intervenor, in the case of *Collier v. Walters* (3), the person who pleaded *res judicata* was not a necessary party to the suit, but as he raised the question by putting in his answer, he was held to be bound.]

Baboo Mohesh Chunder Chowdhry on the same side.—The suit is not *res judicata*, and even allowing that it is, can it be *res judicata* further than the rent-case was decided? The subject-matter of the first suit was the rent of particular land, whilst the subject-matter of the second suit is as to who is the proprietor of the properties in suit. There may be a right to recover rent wholly independent of proprietorship. [PONTIFEX, J.—There is no such thing as an attornment by an occupancy-ryot in this country; the person who has the right to rent is the proprietor.] The receipt of rent would be immaterial if the Court was trying the right of the intervenor in a rent-suit—*Choolie Lall v. Kokil Singh* (4). *Gobind Chunder Koondoo v. Turuck Chunder Bose* (5) is not so strongly against us; in order to affect us, it must be shown that a distinct issue as to title was raised and decided. [PONTIFEX, J.—I am told by the Chief Justice that the case is not correctly stated; there were several other jotes besides the one set out.] As far as my argument is concerned, it is immaterial whether there were other jotes. I say a distinct issue to title must be raised; the case itself is distinct from this, but might have been in our way if the Court had raised the issue and decided it. In the case of *Tekait Doorga Persad Singh v.*

(1) 8 W. R., 175; S. C., 2 Ind. Jur., (3) L. R., 17 Eq., 262.

N. S., 265.

(4) 19 W. R., 246.

(2) L. R., 10 C. P., 29.

(5) I. L. R., 3 Calc., 145.

Tekaitni Doorga Konwari (1), the plaintiff raised an issue, and the Court held that the defendant was bound to disclose his whole defence. That case shows, that although an issue may be tried, and that issue may for certain purposes be conclusive, yet, for other purposes, the same issue may be raised in another suit. The case of *Booa Russoolee v. The Nawab Nazim of Bengal* (2) shows, that although an issue may be raised for one purpose, it is not conclusive for all purposes. The Munsif was not competent to try the case, because the value of the property exceeded the limits of the value of cases triable by him—*Shaikh Muzhur Ali v. Mussamut Basoo* (3).

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The *Standing Counsel* (Mr. J. D. Bell, with him Baboo Kally Mohun Doss and Moonshree Mahomed Yusoof) for the respondent.—The issue in the rent-suit as regards separation was intended to be raised. [PONTIFEX, J.—Supposing the issue to have been raised and determined, was the Court competent to decide it?] If I can satisfy the Court that all the property was held under one title, then the title of one and all the properties must stand or fall by the title of one of them. Then *res judicata* would apply. The mokurari pottas may be considered to be the title-deeds of the properties of each of the parties. According to the case of *Krishna Behari Roy v. Brojeswari Chowdranee* (4) the present case is barred. [PONTIFEX, J.—In a question of adoption, where there is a decision as to separation, the issue must apply to the whole of the land; but in a question of partition it need not.] The case of *Gobind Chunder Koondoo v. Taruck Chunder Bose* (5) decides that a suit which reopens an issue decided on the intervention of a third party in a former suit, is barred; and the case of *Bemola Soondury Chowdrain v. Panchann Chowdhry* (6) followed that decision. The case of *Fran Nath Sandyal v. Ram Coomar Sandyal* (7) decides, that an intervenor is bound where the plea of *res judicata* had been waived in the Court below;

(1) L. R., 5 I. A., 149; S. C., I. L. R., 4 Calc., 190. (4) L. R., 2 I. A., 283; S. C., I. L. R., 1 Calc., 144.

(2) 11 W. R., 382.

(5) I. L. R., 3 Calc., 145.

(3) 8 W. R., 47.

(6) *Id.*, 705.

(7) 2 C. L. R., 33.

1880 and it further decides that the Munsif's decision was conclusive,
 RUN BAHADUR SINGH although outside his pecuniary jurisdiction.

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" The *Advocate-General* in reply.

The judgment of the Court (PONTIFEX and McDONELL, JJ.) was delivered by

PONTIFEX, J. (who, after going into the merits of the case at some length, and stating the facts material to the question of *res judicata*, continued):—

The question we have now to determine is, whether the prior decisions affect the present suit and the title set up by the plaintiff as *res judicata*. It is to be observed that only a special appeal could be preferred to the High Court against the judgment of the Subordinate Judge (though, as a matter of fact, no special appeal was preferred), and that this rent-suit related to only one mouza, or part of a mouza, held under one only of the mokuraris.

But, on the other hand, the two mokuraris, though separate, were exactly similar titles; and it has never been part of the plaintiff's case, that different parts of Bishen Singh's property are governed by different circumstances. Indeed the evidence in the rent-suit applies generally to the commensality or separation of the plaintiff and Murlidhur; and that was the issue which the plaintiff Run Bahadur raised by his written statement in the rent-suit.

With respect to this, the judgment of Lord Ellenborough in *Outram v. Morewood* (1) seems significant. Recovery in any one "suit upon issue joined on matter of title is conclusive on the subject of such title; and a finding upon title in trespass not only operates as a bar to the future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession."

It is necessary, however, for us to examine a few of the Indian authorities upon this subject.

In a case referred to Sir Barnes Peacock, in consequence of a division of opinion in a Bench of this Court, and reported at

p. 175 of the Civil Rulings of the eighth volume of the Weekly Reporter (unreported elsewhere) (1), it was held, that the Collector's Court, in a case under the Rent Law of 1859, and the Civil Court were not concurrent Courts; and therefore that a decision by the Collector was clearly not *res judicata* to affect the Civil Court. But while establishing this plain proposition, Sir Barnes Peacock, in his judgment, entered into certain ingenious, but "extra-judicial, observations with respect to the doctrine of *res judicata* as applicable or not to Indian Courts. At page 178 he says:—"It is very important also to see what would be the result if the question of concurrency of jurisdiction were put out of question. It appears to me to be of much more importance in this country than it would be in England, that, in order to render a judgment between the same parties upon the same point in one Court conclusive in another Court, the two Courts must be Courts of concurrent jurisdiction. If it were not so, the whole procedure as regards appeals might be entirely changed, meaning, I presume, that different procedure as to appeals might apply to the two cases."

And again (p. 179) he says: "A bond of a very large amount might be set up as an answer in a suit in the Munsif's Court or in a Court of Small Causes for a very small amount; but it never could be held that a decision in those Courts as to the validity or invalidity of the bond as a defence to the suit would be conclusive upon the (District) Judge in a suit brought upon the bond, and upon the High Court in a regular appeal from a decree in that suit." And again: "It is quite clear that, in order to make the decision of one Court final and conclusive in another Court, it must be a decision of a Court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive." And again (p. 180): "I should be disposed to say that the English rule of estoppel ought not to be introduced into the Courts of this country, if the question should ever arise before me. I am at present disposed to think that such a judgment is only *primâ facie* evidence, and not conclusive."

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(1) The case (*Mussamut Edun v. Mussamut Bechun*) is also reported in 2 Ind. Jur., N. S., 265.

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The last opinion quoted has been expressly overruled by the Privy Council. The other observations, however, raised a serious question; they have not been expressly, but it seems to us they have been impliedly, overruled by the Privy Council; and they also seem opposed to other decisions.

Now a suit in the Munsif's Court must be under Rs. 1,000 in value; from his decision there is a regular appeal on fact and law to the District Judge or Subordinate Judge, from whom there is only a special appeal on points of law to the High Court; and no appeal at all, except under very special circumstances, to the Privy Council. If, then, the advantages or disadvantages with respect to appeal are to govern the question, whether a judgment can be relied on as *res judicata*, it would seem to follow that judgments in cases under Rs. 10,000 and, indeed (see s. 596 of the present Procedure Code), in cases over Rs. 10,000, where concurrent judgments have been given by the original Court and first Court of appeal, and no substantial question of law arises, would, in all cases of Rs. 10,000 and upwards, be incapable of being pleaded as *res judicata*, because in such last-mentioned cases it would be impossible to predicate that there might not be an appeal to the Privy Council. This, to say the least, would be an extremely shift and inconvenient principle to act upon; and, as I shall presently show, has been disregarded by the Privy Council.

But the Advocate-General has argued, and argued with great force, that the judgment of a Court ought not to have the effect of *res judicata* in a case which that Court was not itself competent to try; being in fact the proposition contained in the third of the above extracts from Sir Barnes Peacock's judgment, which seems to require identity, rather than concurrency, of jurisdiction. As for example, in the present case, the Munsif having a jurisdiction to try cases only up to the value of Rs. 1,000, was competent to try the rent-suit against Guveshi Roy, but was not competent to try the present suit; nay, would not have been competent to try a suit for possession of the mouza in respect of which rent was claimed. But this contention would in effect make the doctrine of *res judicata* inapplicable to suits tried by Munsifs except in Munsifs' Courts—a result which might

possibly be advantageous, but for which we find no authority. The 2nd section of Act VIII of 1859 speaks of a Court of "competent jurisdiction." Did it mean competent to try the question of title, or competent to try the second suit? The words are "competent to try the cause of action."

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The judgment of the Privy Council—*Khugowlee Singh v. Hossein Bux Khan* (1)—refused to consider a Collector's decision *res judicata*, because it was not that of a "Court competent to adjudicate on a question of title."

It would seem to be refining too much to confine the doctrine of *res judicata* in India to exactly parallel Courts, to hold that a Munsif's judgment on a question of title should only be *res judicata* in a Munsif's Court. One result would be, that there would constantly be a preliminary wrangle as to the valuation of the suit. And it does not seem a satisfactory principle that a Munsif's judgment should be *res judicata*, and an authoritative decision on title in a suit valued at Rs. 999, and not so in a suit on the same title valued at Rs. 1,001.

More especially would it be a hardship in a case like the present (which is only an example of the general practice in India), where the plaintiff obtruded himself into the rent-suit, raised the very question he raises in this Court, and put the defendant, who was plaintiff in that suit, to the same expense and trouble as if the title to the entire property depended on the result.

In the case of *Soorjomonee Dabee v. Suddanund Mahapatra* (2), the Judicial Committee expressed their opinion that the 2nd section of Act VIII of 1859 "would by no means prevent the operation of the general law relating to *res judicata* founded on the principle, *nemo debet bis vexari pro eadem causa*."

This maxim was the foundation of the decision in *Collier v. Walters* (3), and the case of *Flitters v. Alfrey* (4) seems to show that the judgment of a Court not competent to try the case in which the judgment is pleaded as *res judicata* must, nevertheless, be held to be the judgment of a Court of competent

(1) 7 B. L. R., 673.

(3) L. R., 17 Eq., 252.

(2) 12 B. L. R., 304.

(4) L. R., 10 C. P., 29.

1880 jurisdiction within the rule. For in that case the defendant
 RUN BAHADUR SINGH v. LUCHO KOOR. having complied with the provisions of s. 39 of 19 and 20 Vict.,
 c. 108, the County Court thereupon became incompetent to try the case, though otherwise it might, in the absence of the defendant's dissent, have tried it; and the present case especially falls within the wholesome principle expressed in the judgment of that case (p. 42): "It would in our judgment be against principle and authority, if a party, having tried an experiment in a County Court, could, when judgment was against him, proceed again in another Court, not by way of appeal, but by merely varying the form of procedure, or forcing the opposite party to proceed for redress in respect of the same question as had been previously litigated, again harass his antagonists for the same cause, and take his chance of success in another Court, when he has previously failed in a Court of competent jurisdiction."

The 13th section of Act X of 1877 seems to support this view; for it enacts, that no Court shall try any "issue, &c." (*reads* s. 13). And this section being in a Procedure Act, must, we think, be taken to be declaratory of the existing law. We think it clear that the issue of separation was "directly and substantially" in issue in the rent-suit; and though the Munsif was not competent to try the present suit, we think he was competent to try, and at the instance of the present plaintiff did try, in the rent-suit, the issue on which the present suit depends.

Moreover, if the question of advantage or disadvantage in respect to ultimate appeals is to be disregarded, as we think the Privy Council case hereafter referred to shows, then it is important to remember that the rent-suit was also tried and decided on regular appeal, both as to law and fact, by the Subordinate Judge, whose Court was a Court competent to try the present suit.

We do not refer to the Full Bench decision in the case of *Gobind Chunder Koondoo v. Taruck Chunder Bose* (1), because there, as we have been informed, both decisions were in the Munsif's Court, otherwise that case would be conclusive on the question.

There are, however, two decisions of this Court in which, being cases instituted in the Court of the Subordinate Judge, judgments of the Munsif's Court were regarded as having the effect of *res judicata*. These cases are : *Bemola Soondury Chowdrain v. Punchanun Chowdhry* (1) and *Nund Kishore Singh v. Huree Pershad Mundul* (2). It is true, as pointed out by Mr. Justice White in the case of *Toponidhee Dhirj Gir Gosain v. Sreeputty Sahanee* (3), that in both these cases the Judges were prepared to arrive at the same conclusion on other grounds. But in effect the question seems to have been substantially settled by the Judicial Committee in the case of *Krishna Behari Roy v. Brojeswari Chowdranee* (4).

In one sense, no doubt, the two Courts in that case had identical jurisdiction, for any suit which the District Judge was competent to try, the Principal Sudder Ameen (now called the Subordinate Judge) was also competent to try, if the District Judge appropriated the case to his Court for hearing. But practically (and this in effect meets the objections of Sir Barnes Peacock as to the advantages or disadvantages with respect to appeals) and as the matter actually stood, the jurisdictions were not identical; for when a Principal Sudder Ameen tried cases valued at over Rs. 5,000, the appeal lay direct to the High Court both on fact and law; but when he tried cases under Rs. 5,000, the appeal lay on law and fact to the District Judge, from whom only a special appeal on point of law lay to the High Court. The fact that the District Judge might have tried the case as an original case, does not prevent the Court of the Principal Sudder Ameen being a subordinate Court to that of the District Judge in cases under Rs. 5,000, heard by the Principal Sudder Ameen.

In the case before the Privy Council, the judgment of the Principal Sudder Ameen in the first suit, as the suit was valued under Rs. 5,000, went on regular appeal to the District Judge, and from him, only on special appeal, to the High Court. The judgment of the Principal Sudder Ameen having been affirmed

(1) I. L. R., 3 Calc., 705.

(4) L. R., 2 I. A., 283; S. C., I. L.

(2) 13 W. R., 64.

R., 1 Calc., 144.

(3) I. L. R., 5 Calc., 832.

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by both Courts, was held to have the effect of *res judicata* upon the second suit heard primarily by the District Judge, which went up to the High Court on regular appeal, and thence to the Privy Council.

We think that the rule of *res judicata* ought to be held to apply to judgments in rent-suits, at least until interventions in such suits are authoritatively prohibited; otherwise all the inconvenience and hardships which the rule is intended to obviate must continue to exist.

Upon the whole, therefore, though with regret, we feel we are bound to hold that the judgment in the rent-suit on the substantial issue of separation must be regarded as *res judicata* governing the present suit, and we must, therefore, affirm the decision of the Court below; though we differ from its judgment both on the merits and on the question of estoppel, but as the plea of *res judicata* was not raised until after all the evidence had been taken and great expense incurred, we think each party should bear his and her own costs both in this Court and in the Court below, and we direct accordingly. We dismiss the appeal of the plaintiff, and allow the cross-appeal of the defendant.

Appeal dismissed and cross-appeal allowed.

SMALL CAUSE COURT REFERENCE.

1880
 Sept. 1.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

FRECK v. HARLEY.

Costs—Abatement or Dismissal of Suit for want of Jurisdiction—Presidency Small Cause Courts Act (IX of 1850), ss. 42, 52.

Where a plea to the jurisdiction of the Small Cause Courts established under Act IX of 1850 is successful, the judgment ought to be one dismissing the suit. But whatever the form, it should be stated that the suit abates or is dismissed "for want of jurisdiction." In such a case the Court has power to award costs to the defendant.

THIS was a case referred from the Calcutta Court of Small Causes. The reference stated as follows:—

"This suit was instituted on the 2nd April 1880, and heard by

* Case stated for the opinion of the High Court under the provisions of Act IX of 1850, by H. Millett, Esq., and K. L. Banerjee, Esq., Judges of the Calcutta Court of Small Causes.

the First Judge in the first instance on the 24th May. The First Judge was then of opinion, that the suit ought to be dismissed on a point of law and also on a question of jurisdiction ; and he accordingly dismissed the suit, and certified it as a fit case for counsel and attorney, awarding to counsel two gold mohurs and to attorney one gold mohur.

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“ Against this decision an application for a new trial was made on the following grounds :—(i) that the Court, having no jurisdiction in the case, was wrong in making an order for costs ; (ii) that the Court should have merely noted the abatement of the suit on the record, and had no jurisdiction to dismiss the suit.

“ This application was allowed on the 26th June 1880. The only question now raised before us is, whether the original order as to costs was good or not, plaintiff's pleader admitting that the Court has no jurisdiction.

“ It is necessary to state that, up to the present time, in questions connected with jurisdiction, this Court has always followed the decision in *Lawford v. Partridge* (1). The Court of Exchequer in that case laid down the rule, that where a County Court has no jurisdiction to hear a case, it has no power to award costs ; and that the proper order should be that the suit should abate. It based its decision on ss. 79 and 88 of 9 and 10 Vict., c. 95 (the County Courts' Act), which are identical with ss. 42 and 52 of Act IX of 1850, the Act which governs this Court. The former of these sections gives power to the Court to award costs to the defendant when he shall not admit the demand ; and the latter gives the Court power to apportion the costs of any action or proceeding before it, not therein otherwise provided for, in such manner as it shall think fit. The same conclusion as in *Lawford v. Partridge* (1) was arrived at in *Peacock v. The Queen* (2). The question again occurring in *Diss Urban Sanitary Authority v. Aldrich* (3), the contrary opinion was arrived at, although *Peacock v. The Queen* (2) was cited as an authority. The Court in the last instance seems to have followed *McIntosh v. The Lord Advocate* (4).

(1) 1 H. & N., 621.

(3) L. R., 2 Q. B. D., 285, note.

(2) 4 C. B., N. S., 264, at p. 268.

(4) L. R., 2 App. Cas., 41, at p. 78.

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HARLEY. "It was again raised in *The Great Northern Committee v. Inett* (1), in which previous cases, except *Lawford v. Partridge* (2), were referred to; and Cockburn, C. J., gives his opinion thus: 'The respondent is entitled to avail himself of the objection, and he is obliged to come here and inform us of the absence of jurisdiction, for if he did not, the objection would not appear and judgment would be given against him. As he is obliged to come here by the act of the appellant, he is entitled to his costs. It is clear that, to some extent, there is jurisdiction over the subject, for the Court has jurisdiction to hear and determine whether the appeal lie or not. I am of opinion that, under these circumstances, there is jurisdiction to give costs.' Such reasoning as has been very ably put by Mr. Allen, the defendant's counsel, commends itself to the intelligence."

The following decisions, under the general power to award costs given by s. 187 of Act VIII of 1859, were also referred to as bearing on the question:—*Gopal Chuunder Bose v. Dhurun Dhur Roy* (3), *Muharajah Jugesshur Bunwaree Gobind v. Seet Chunder Sircar* (4), *Punchanun Ghose v. Brojendro Narain Deb* (5), in all of which it was held that, where a suit or an appeal is dismissed for want of jurisdiction, the Court has power to award costs to the successful party.

The learned Judges were of opinion that the weight of the authorities was in favor of the Court having power to award costs, whether it has jurisdiction to hear the matter or not, and therefore gave judgment that the suit should abate, and that the plaintiff should pay costs to the defendant, contingent on the opinion of the High Court on the following questions:—

(i) Whether the judgment, where the Court has no jurisdiction, should be, that the suit abates or that it be dismissed?

(ii) Whether, where this Court has no jurisdiction, it has power to award costs to the defendant?

The opinion of the High Court was as follows:—

GARTH, C. J.—It appears to us that the real answer to this suit was rather a matter of law than of jurisdiction, but we

(1) L. R., 2 Q. B. D., 284.

(3) Marsh. Rep., 311.

(2) 1 H. & N., 621.

(4) *Id.*, 375.

(5) 1 Ind. Jur. (N. S.), 38.

think that the questions referred should be answered as follows :

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(i) A plea to the jurisdiction is a plea in bar ; and, therefore, the proper judgment would be, that the suit be dismissed ; but whatever may be the form used, it should be stated that the suit abates or is dismissed " for want of jurisdiction," otherwise the plaintiff might be prejudiced when he brings his suit in another Court.

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(ii) We think that the Court has power in such a case to award costs to the defendant. The question of jurisdiction is one which the Court is bound to try, and as the plaintiff invites the trial by bringing his suit, it is only right that he should pay costs if he turns out to be wrong. It appears to us that the cases of *Lawford v. Partridge* (1) and *Peacock v. The Queen* (2) have been virtually overruled by the case of *McIntosh v. The Lord Advocate* (3).

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Mitter.

SHOSHII SHIKHURESSUR ROY, A WARD OF COURT, BY HIS MOTHER
(DEFENDANT) v. TAROKESSUR ROY (PLAINTIFF).*

1880
Sept. 9.

*Hindu Law—Will—Construction of Will—Restriction of Gift to Male
Descendants void—How such a Gift should be construed..*

A gift by will upon condition that the subject-matter should descend to heirs male only, is void by Hindu law.

By his will a Hindu testator made a gift of certain immoveable property to his nephews and their descendants in the male line with a condition that, "if any of them die childless, then his share shall devolve on the survivors of my nephews and their male descendants, and not on their other heirs."

Held, that the gift was bad in so far as it restricted the subject-matter of the gift to male descendants, but that the language used relating to the gift over to the testator's surviving nephew or nephews, was not inconsistent with the intention of the testator that the whole augmented share should pass to the plaintiff, the sole surviving nephew ; but that, having regard to the doctrine frequently acted upon by the Courts of India, he was only entitled to a life-estate therein.

* Appeal from Original Decree, No. 205 of 1878, against the decree of Baboo Jodu Nath Mullick, First Subordinate Judge of Rajshahye, dated the 2nd May 1878.

(1) 1 H. & N., 621.

(2) 4 C. B., N. S., 264, at p. 268.

(3) L. R., 2 App. Cas., 41, at p. 78.

1880 THIS was a suit brought to recover possession of an eight-
 SHOSHI anna share in two mouzas, together with mesne profits since
 SHIKHURES- the period of dispossession.
 SUR ROY
 v.
 TAROKESSUR The plaintiff stated that Raja Chunder Shikhuressur Roy,
 ROY. his uncle, by a will dated 2nd Srabun 1272 (16th May 1865),
 bequeathed under the 8th clause, an eight-anna share in three
 estates, to Kumar Tarokessur Roy (the plaintiff), Kumar Jugodis-
 sur Roy, and Kumar Sibessur Roy, his brothers, providing "that
 they should possess the same in equal shares, having no right to
 alienate the same by gift or sale, but that they, their sons, grand-
 sons, and their descendants in the male line should enjoy the
 same: if any of them die childless, which God forbid, then his
 share shall devolve on the survivors of my nephews and their
 male descendants, and not on their other heirs;" that, on the death
 of the testator in 1273 (1866), his widow made over posses-
 sion of the said properties to the father of the plaintiff, as guar-
 dian of the plaintiff and his two brothers, but subsequently
 again took possession of the properties and made them over to
 the Court of Wards on behalf of her minor son (the defendant);
 and that both the plaintiff's brothers died unmarried.

The widow of the testator, as representative of her minor son, contended, that the will had been tampered with; that the alleged gift to the nephews of the testator was contrary to Hindu law; and that, according to the will, the plaintiff and his brothers took only a life-interest in the properties, the gift beyond the life-interest being void; and that the two brothers of the plaintiff having died, their shares reverted to the testator's lawful heirs.

The Subordinate Judge held, that the will had not been tampered with, but that the testator had intended to tie up his estates in the direct male line, contrary to the Hindu law; but further added, that as the plaintiff survived his other brothers, that part of the will which provided that, in the event of any one of the nephews dying without issue, his share was to go over to the surviving nephew, was capable of taking effect, and therefore the plaintiff was entitled to a decree for possession of the eight-anna share of the estates with wasilat.

The defendant appealed to the High Court.

The *Advocate-General* (Mr. G. C. Paul, with him Baboo Annoda Pershad Banerjee) for the appellant. — I contend that the will is a forgery, the original will having been altered by interpolating leaves; the will which the testator made had his seal at the top and end of each page. Clause 8 is entirely inconsistent with the schedule, and this discrepancy has not been mentioned by the Judge. The testator has, by the words of the will, attempted to make a species of estate-tail, which he cannot do; see *The Tagore case* (1). Can the donee, therefore, have more than an estate for life? If the estate which the testator intended to give was one which the law prohibits, effect cannot be given to his intention; and here it is clear, he endeavoured to give more than a life-estate. See *Bhoobun Mohini Debia v. Hurrish Chunder Chowdhry* (2). The gift is further one to a class, some persons of which were not in existence at the time of the death of the testator, and consequently the whole bequest is void—*Srimati Bramamayi Dasi v. Jages Chandra Dutt* (3); see also the case of *Soudaminey Dossee v. Jogesh Chunder Dutt* (4).

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The *Standing Counsel* (Mr. J. D. Bell, with him Baboo Srinath Dass) for the respondent.—The Courts are always inclined to assist a will as much as possible, where it is plain that the testator desired to make an absolute gift; and I contend that an absolute gift was given—*Mussumut Kollany Koer v. Luchmee Pershad* (5). The present case seems very much on a footing with *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick* (6). [GARTH, C. J.—I do not think that case applies, as, if we gave you an absolute estate, we should be doing that which the testator directly declared should not be done; but in *Soorjeemoney's case* (6) the Court were enabled to give her an estate-in-fee consistently with the terms of the will.] The other side have relied on the case of *Bhoobun Mohini Debia v. Hurrish Chunder Chowdhry* (2), but there the gift was intended to convey

(1) 9 B. L. R., 377, at p. 406.

(3) 8 B. L. R., 400.

(2) I. L. R., 4 Calc., 23, at p. 27; S.

(4) I. L. R., 2 Calc., 262.

C., L. R., 5 I. A., 138.

(5) 24 W. R., 395.

(6) 9 Moore's I. A., 123.

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more than a life-estate, intending to convey what the law prohibits; and their Lordships of the Privy Council put a fair construction on the will, and gave an absolute estate to Kassissari.

The judgment of the Court (GARTH, C. J., and MITTER, J.) was delivered by

GARTH, C. J.—The plaintiff brought this suit to recover possession of an eight-anna share of taluks numbered 278 and 456, under the following circumstances:—

These two taluks and another numbered 96, together with several other estates, &c., constituted the joint property of two brothers, Raja Chunder Shikhuressur Roy and Raja Mohessur Roy, each entitled to a moiety. The plaintiff is one of the sons of the latter, and the minor defendant is the sole surviving son of the former. When Raja Chunder Shikhuressur died, Raja Mohessur had five sons living, *viz.*, the plaintiff, Kumar Jugodissur, and Kumar Sibessur, being three uterine brothers by a deceased wife, and Bissessur and Kopessur by his then living wife. Chunder Shikhuressur died on the 29th Srabun 1272 (August 1865), leaving him surviving a widow, Ranee Soudamini, and only son, the minor defendant, by the aforesaid Ranee, and two daughters, whether by the aforesaid Ranee or not is not clear upon the evidence. He died at Rampur Boalia, the head-quarters of the district of Rajshahye, having come thither about ten or twelve days before his death, accompanied by only a few servants; not a single member of his family was about him at the time of his death. It is not disputed that 27 days before his death,—*i. e.*, on the 2nd Srabun 1272,—he executed a will at his family residence at Taherpur, distant about eight or ten hours' journey from the head-quarters.

It is alleged that, by the 8th clause of this will, Raja Chunder Shikhuressur bequeathed his eight annas share of the taluks in claim, as well as of the taluk No. 96, to the plaintiff and his two uterine brothers. The clause in question is to the following effect:—

“My brother's sons, Kumar Jugodissur Roy, Kumar Tarokessur Roy, and Kumar Sibessur Roy, shall receive, for defrayment of the expenses of their pious acts, the following out of the

properties left by me, to wit: my one half share in Parganna Chungoo, recorded as No. 278 in the Collectorate of Zilla Rajshahye in Dihi Dolil, and others appertaining to Tuppa Byas, and recorded as No. 456; and in Mouza Dihi Govindpur in Parganna Sautool, recorded as No. 96 in the touji or rent-roll of the Collectorate of Zilla Dinagore. The said three nephews shall hold possession of the above in equal shares, and shall pay the Government revenue of the same into the Collectorate. They shall have no right to alienate the same by gift or sale, but they, their sons, grandsons, and other descendants in the male line shall enjoy the same, and shall perform acts of piety as they respectively shall think fit for the spiritual welfare of our ancestors. If any of them die without leaving a male child (which God forbid), then his share shall devolve on the surviving nephews and their male descendants, and not on their other heirs."

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The plaintiff further alleged, that, after the death of his uncle his father was allowed to take possession of the eight annas share of all these three taluks as guardian of his three sons. But from the month of Bysack 1273 B. S., Ranee Soudamini, on behalf of her minor son, the defendant in this case, dispossessed him from the aforesaid eight annas share of the two taluks claimed in this suit; that, subsequently, when the whole estate of the minor defendant was taken charge of by the Court of Wards, the disputed share of the two taluks also came into their possession.

The plaintiff's elder brother, Kumar Jugodissur Roy, and his younger brother, Sibessur Roy, having both died on the 24th Maugh 1279 B. S. (February 1873) and the 5th Kartick 1276 (October 1869) respectively, without leaving any male issue, the plaintiff claims the whole eight annas share under the terms of the will. The taluk No. 96 is not included in this suit, because it is alleged that, out of the share bequeathed by the will, he is in possession of four annas, the other four annas being in possession of the Court of Wards, not on behalf of the minor defendant, but on behalf of the widow of his elder brother Kumar Jugodissur Roy.

• According to the provisions of the Act relating to the Court

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of Wards, the suit was brought against the minor defendant represented by the manager appointed by the Court of Wards, viz., Horo Gobind Bose. But the Court of Wards, by an order dated the 28th May 1877, authorized Ranee Soudamini, the mother of the minor defendant, to appear as his guardian, instead of the aforesaid manager, and thenceforward the suit was defended by the Ranee on behalf of her minor son.

Her defence was, that the 8th clause and several other clauses of the will, upon which the plaintiff relies, are not genuine, but were substituted by some of the amlahs of the deceased Raja shortly before his death in the place of certain other clauses of the original genuine will. It was further stated in the defence, that, supposing the clause in question is genuine, the bequest is in many respects invalid, and that, at any rate, the plaintiff is not entitled to more than a life-interest in a one-third share of the eight annas which the clause in question purports to bequeath.

The lower Court, overruling the defence, decreed the plaintiff's suit. On appeal all the points raised in the defence have been raised before us, and with reference to them two questions call for decision: First, whether the 8th clause of the will produced in this case, as that of the Raja Chunder Shikhuressur, is genuine or not? and secondly, if it is genuine, upon a correct construction of it, what are the rights of the contending parties under it in respect of the eight annas share of the two taluks which form the subject-matter of this suit?

(After considering the evidence the learned Chief Justice continued.)

On the whole, upon a careful consideration of the evidence we think that the conclusion of the lower Court upon the question of the genuineness of the will filed in this case is correct.

The next question is, what are the rights of the contending parties under the 8th clause with reference to the taluks in suit. The gift in the first place is to the three brothers, including the plaintiff, and to their succeeding generation in the male line. There is this further condition that, should any of the brothers die without leaving a male child, then his share shall devolve on his surviving brother or brothers and their male descendants.

We are of opinion that the condition imposed upon the gift, that its subject-matter should devolve on male descendants only, is invalid. In *Jotendro Mohun Tagore v. Ganendro Mohun Tagore* (1) the Judicial Committee observe :—" It follows directly from this, that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate ; and that the gift must fail, and the inheritance take place as the law directs." Further on they say :—" If, on the other hand, the gifts were to a man and his heirs to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as for instance, if an estate were granted to a man and his eldest nephew, and the eldest nephew of such eldest nephew, and so forth for ever, to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime, here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect, except in favor of such persons as could take under a gift to the extent to which the gift is consistent with the law. The first taker would in this case take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that estate of inheritance which it confers is void."

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Applying the principle enunciated in these observations to the terms of the will in this case, it is clear that, under the bequest, the three brothers, including the plaintiff, received the taluks in equal shares for their respective lives, and that the course of succession which was subsequently indicated by the testator being contrary to Hindu law, the particular estate of inheritance which he attempted to create was void.

Therefore, on the testator's death, a one-third share of the eight annas of the taluks in suit devolved upon the plaintiff, enjoyable by him for his life, and the remaining two-thirds in equal shares devolved upon his two brothers, enjoyable by them in equal shares for their respective lives.

(1) 9 B. L. R., 377, at pp 394, 395, and 396.

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But then these brothers died, one after the other, without leaving any male issue. Kumar Sibessur died first on the 5th Kartick 1276 (October 1869), leaving him surviving the plaintiff and his elder brother Kumar Jugodissur. On the happening of such a contingency as this, the will provides that the share bequeathed to the deceased was to devolve upon the surviving brothers and their male descendants. This latter limitation, being contrary to Hindu law, is void. But the gift over to the surviving brothers is not invalid according to Hindu law; see *S. M. Soorjeemoney Dossee v. Denobundoo Mullick* (1) and the observations of the Judicial Committee upon that case in *Tagore v. Tagore* (2).

For similar reasons, upon the death of Kumar Jugodissur without leaving any male issue, his original share (*viz.* $\frac{1}{3}$) devolved upon the plaintiff. It is somewhat doubtful whether, along with Jugodissur's original share (*viz.* $\frac{1}{3}$), the share received by him on the death of Sibessur also did not pass to the plaintiff. But having regard to the provisions relating to the legacy as a whole, we think that it was the intention of the testator that the whole augmented share should pass to the plaintiff, who was the sole surviving brother. The language used relating to this gift over to the surviving brother or brothers is not inconsistent with this intention.

We, therefore, come to the conclusion, that the whole eight annas share of the two taluks, the subject-matter of this suit, has devolved upon the plaintiff under the provisions of the will of Raja Chunder Shikhuressur. But we do not agree with the lower Court that the plaintiff's right thereto is absolute. His interest will determine with his death, and, upon the happening of that event, the disputed share of the taluks in question will revert to the legal heir of the testator.

In modification of the decree of the lower Court, we decree the possession of the disputed share of the two taluks, which is the subject-matter of this suit, and declare that the plaintiff has therein only a life-interest. We do not interfere with the

(1) 9 Moore's I. A., 123, at p. 134.

(2) 9 B. L. R., 377, see pp. 399, 400.

decree of the lower Court as to mesne profits, but, under the circumstances of the case, we think that each party should bear his own costs in this as well as in the lower Court.

Decree varied.

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Before Mr. Justice Morris and Mr. Justice Prinsep.

IN THE MATTER OF THE PETITION OF NILMONEY SING.*

UMANATH MOOKHOPADHYA v. NILMONEY SING.

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Sept. 10.

*Probate—Application for Order revoking Probate—Attaching Creditor of
Next-of-kin—Succession Act (X of 1865), s. 234.*

A judgment-creditor, who has attached property of his debtor, which purports to have been inherited by such debtor from his deceased father, may, where the will of such deceased is set up and proved at variance to his interests, apply for a revocation of the order granting probate of the will so set up.

Komollochun Dutt v. Nilruttun Mundle (1) followed.

THE facts of this case material to this report are as follows:—

One Bamon Dass died some time in January 1875, leaving him surviving his widow Bhoyharini Debi, his son Taranath, and several other sons. Nilmoney Singh, the petitioner, having obtained a decree against Taranath, attached, in February 1875, certain lands purporting to be the property of Taranath inherited from his father. The widow Bhoyharini intervened in these attachment-proceedings; but, on the 11th February of the same year, her claim was disallowed. Subsequently, on the 14th March 1876, Bhoyharini, in conjunction with her sons other than Taranath, applied for, and on the 24th of the same month obtained, an order granting her probate of the alleged will of her husband Bamon Dass. The probate itself, however, was not issued till the 21st of December following. On the 1st April 1876, Bhoyharini instituted a suit against Nilmoney, praying for a declaration of her right to

* Appeal from Original Decree, Nos. 108 and 109 of 1879, against the decree of L. R. Tottenham, Esq., Officiating Judge of Nuddea, dated the 24th March 1879.

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the lands attached by Nilmoney under the decree previously obtained by him against Taranath. On the 22nd of December 1876, Nilmoney lodged an application, under s. 234 of the Succession Act, in the Court of the District Judge, for a revocation of the order of the 24th March granting probate of the alleged will of Bamon Dass to the widow Bhoyharini. The District Judge, on the hearing of this application, reversed his former order granting probate, and also subsequently dismissed the regular suit instituted by Bhoyharini against Nilmoney. The widow appealed in both cases to the High Court. By its judgment, dated the 8th May 1878, the High Court (Markby and Prinsep, JJ.) set aside the order made by the District Judge, reversing his previous order granting probate to the widow, on the ground of inadequate service of notice on all the parties interested under the will, and remanded the matter to the Court below in order that it might be again adjudicated upon after an opportunity had been afforded the petitioner to remedy this material defect. The High Court also reversed the order made in the regular suit instituted by the widow against Nilmoney, and remanded it to the Court below for rehearing. Under these orders of remand the Court below retried both cases, but substantially adhered to its former judgments, revoking the former grant of probate and dismissing the suit of Bhoyharini.

The widow again appealed in both cases to the High Court.

Baboo Sreenath Dass, Baboo Mohiny Mohun Roy, Baboo Rashbehary Ghose, Baboo Kashee Kunt Sen, and Baboo Grish Chunder Chowdhry for the appellant.

Baboo Ambica Churn Bose and Baboo Bhowany Churn Dutt for the respondent.

The judgment of the Court (MORRIS and PRINSEP, JJ.), so far as is material for the purposes of this report, was delivered by

MORRIS, J. (who, after stating the facts, proceeded as follows):—The first question that arises is, whether Nilmoney Singh, as creditor of Taranath, has any *locus standi*? Whether he has

such an interest in the estate of the deceased **Bamon Dass** as gives him a right to apply for revocation of the probate granted of his will? In support of the proposition that he cannot apply for the revocation of probate, several authorities have been cited. In *In the matter of Mee Tsee* (1), Mr. Justice Norman, delivering the judgment of the Court, says: "We have no doubt of the soundness of the proposition that a person who is not next-of-kin, and who has no interest in the estate of a testator, has no right to oppose the grant of the probate or dispute the validity of the will. In England it has been held, that even a creditor cannot controvert the validity of a will, because it is a matter of indifference whether he should receive his debt from the executor or from an administrator." Then the case of *Baij Nath Shahai v. Desputty Singh* (2) is quoted to show that the learned Judges there considered that, in this country also, the creditors of next-of-kin to the deceased are not entitled to have citations served upon them under s. 250, Act X of 1865, calling upon them "to come and see the proceedings before the grant of probate or letters of administration." But this case came subsequently under the consideration of another Bench of this Court, of whom a member of the present Bench was one, in connection with the case of *Komollochun Dutt v. Nilruttun Mundle* (3); and Mr. Justice Markby, in giving the judgment of the Court, made the following observations: "If we thought that the decision in *Baij Nath Shahai v. Desputty Singh* (2) went as far as to hold that a purchaser or an attaching creditor could not apply for revocation of a probate, we should, as at present advised, refer the point to be settled by a Full Bench, because we should disagree from such ruling." We entirely concur in the opinion here expressed and considered, that it is applicable to, and meets the circumstances of, the present case. There is no question that Nilmoney Singh, immediately after the death of Bamon Dass, and before probate of his alleged will had been taken out,

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(1) 15 W. R., 351.

(2) I. L. R., 2 Calc., 208; S. C., 25 W. R., 489.

(3) I. L. R., 4 Calc., 360.

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attached the property, which is the subject of the suit of Bhoyharini, as the property of his judgment-debtor Taranath, to which he had succeeded on the death of his father. Owing to the devolution of the property of Bamon Dass by natural succession to Taranath, Nilmoney Singh has such an interest in the property of the deceased as entitles him to dispute the genuineness of a will which purports to divert the succession from Taranath to another. Under s. 234 of Act X of 1865, the grant of probate or letters of administration may be revoked or annulled for just cause; and according to illus. (c) at the foot of that section, such a just cause would be when the will, of which probate was obtained, was forged. Part XXXI, which succeeds s. 234, relates to the practice in granting and revoking probates and letters of administration. Under s. 250 of that chapter, the Judge, when a will is brought before him for probate, may issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate, &c. The words are general, and as Nilmoney Singh has, unquestionably, for the reasons above given, an interest in the estate of Bamon Dass, we see no sufficient cause under the Act why he should not be allowed to enter a *caveat* and oppose the application for probate by Bhoyharini and the other members of the family interested under the will. If he has the right to enter a *caveat* regarding the grant of a probate, he can, on similar grounds, apply for revocation of a probate improperly granted. To rule otherwise would, it seems to us, work great injustice and shut out Nilmoney Singh from all remedy. As pointed out by Mr. Justice Markby, in the case of *Komollochun Dutt v. Nilruttun Mundle* (1), already referred to, "it would lead to the greatest confusion if the validity of a will could be questioned in a civil suit after the grant of probate. There might be any number of conflicting decisions as to the validity of the will. The grant must be contested by a suit in the Court out of which the grant issued, and it must be contested before the Court sitting as a Court of probate, and not in the exercise of its ordinary civil jurisdiction." We, therefore,

(1) I. L. R., 4 Calc., 360.

decide this first point in favor of Nilmoney Sing, and proceed now to deal with the evidence bearing upon the genuineness or otherwise of the alleged will of Bamun Dass.

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I would, therefore, set aside the order of the lower Court, and dismiss the application of the Raja petitioner for revocation of the will of Bamun Dass, and decree the suit of the plaintiff Bhoyharini with costs in both Courts (1).

Appeal allowed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Mitter.

JUGTANUND MISSEK (PLAINTIFF) v. NERGHAN SINGH AND
ANOTHER (DEFENDANTS).*

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Sept. 15.

Evidence Act (I of 1872), s. 92, prov. 3—Parol Evidence in addition to condition in Kistibundi—Part Performance of portion of obligation in Kistibundi.

Per GARTH, C. J.—Where, at the time of the execution of a written contract, it is orally agreed between the parties that the written agreement shall not be of any force until some condition precedent has been performed, the rule that parol evidence of such oral agreement is admissible to show that the condition has not been performed, and consequently that the contract has not become binding, cannot apply to a case where the written agreement had not only become binding, but had actually been performed as to a large portion of its obligations.

The true meaning of the words “any obligation” in the 3rd proviso to s. 92 of Act I of 1872 is any obligation whatever under the contract, and not some particular obligation which the contract may contain.

ONE Ram Monorath sold certain properties to Nerghau Singh and another (defendants), and desired them to pay parts of the purchase-money to one Jugtanund Misser (the plaintiff), to be applied to the discharge of certain debts charged on the properties. The defendants paid part of the purchase-money in cash to the plaintiff, and for the remainder executed a kistibundi in his favor, and gave as security a mortgage on certain immove-

* Appeal from Appellate Decree, No. 636 of 1879, against the decree of E. Grey, Esq., Judge of Gaya, dated the 30th December 1878, reversing the decree of Baboo Matadin, Officiating Subordinate Judge of that district, dated the 28th August 1877.

(1) See *In the matter of the Petition of Bhobosundurce Dubee*, post, p. 460.

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able property belonging to them. The kistibundi contained stipulations that the property which was purchased by the defendants should be at once placed in their hands, (and they in accordance with such stipulation entered into possession), and further that the remainder of the purchase-money was to be paid in certain instalments, on failure of any one of which, the whole sum remaining due should become payable. The instalments not being paid, the plaintiff brought the present suit to recover the whole sum remaining due.

The defendants contended, that it had been verbally agreed between the parties at the time when the kistibundi was executed, that the obligation to pay these instalments was not to be put in force until the plaintiff had paid to one Gobindhur Singh a debt which had been charged upon the property conveyed, and that, at the time the suit was brought, this debt had not been satisfied.

The Subordinate Judge, on the 28th August 1877, held, that parol evidence could not be thus admitted to add a very important condition to the kistibundi, and decreed the suit with interest in favor of the plaintiff.

On the 29th September 1877, a decree was obtained against the plaintiff for the money due to Gobindhur Singh.

The defendants appealed to the District Judge, who decided that parol evidence of the oral agreement was admissible under proviso 3 of s. 92 of Act I of 1872, inasmuch as that agreement constituted a condition precedent to the attaching of the obligation upon which the suit was brought. He therefore remanded the case in order that evidence of the parol agreement should be taken, and on the case coming up again before him, on the strength of the evidence received, decided the case in favor of the defendants.

The plaintiff appealed to the High Court.

Mr. *R. E. Twidale* and Baboo *Juggesh Chunder Dey* for the appellant.

Baboo *Mohesh Chunder Chowdhry* and Moonshee *Mahomed Yusoof* for the respondents.

The judgment of the Court (GARTH, C. J., and MITTER, J.) was delivered by

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GARTH, C. J. (who, after setting out the facts as above, continued):—I think that the District Judge was wrong in admitting the parol evidence; he appears to have admitted it under proviso 3 to s. 92 of the Evidence Act; but that proviso in my opinion does not apply to a case of this kind.

I think that the District Judge has taken a wrong view of proviso 3. That proviso, as it seems to me, is intended to introduce into the law of evidence the rule which is well established and understood in England, and treated of in s. 1038 of Mr. Taylor's book on Evidence. That rule is, that when, at the time of a written contract being entered into, it is orally agreed between the parties that the written agreement shall not be of any force or validity until some condition precedent has been performed, parol evidence of such oral agreement is admissible to show that the condition has not been performed, and consequently that the written contract has not become binding.

This will be found exemplified and explained in the following cases:—*Davis v. Jones* (1), *Bell v. Lord Ingestre* (2), *Pym v. Campbell* (3), and *Annagurabala Chetti v. Kristnasoumi Nayakkan* (4).

These cases show that, until the condition is performed, there is in fact no written agreement at all.

But this rule could never apply to a case where the written agreement had not only become binding, but had actually been performed as to a large portion of its obligations.

To admit parol evidence to show that some particular stipulation could not be enforced, would be to introduce the mischief which s. 92 was intended to prevent; and it seems clear to me that the true meaning of the words "any obligation" in proviso 3 is any obligation whatever under the contract, and not, as is contended by the defendants, some particular obligation which the contract may contain.

(1) 17 C. B., 625.

(3) 6 E. and B., 370.

(2) 12 Q. B., 317.

(4) 1 Mad. H. C. Rep., 457.

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I think, therefore, that the parol evidence was inadmissible, and that as the defence entirely rests upon it, the plaintiff is entitled to a decree.
The plaintiff will be entitled to his costs in both Courts.

MITTER, J.—I concur in this decision. I do not think it necessary to decide the question whether the defendants are entitled to prove the parol agreement upon which they rely; because, assuming that they were so entitled, it was shown in the course of the argument that the plaintiff has discharged the obligation imposed upon him by that agreement.

Appeal allowed.

Before Mr. Justice Tottenham and Mr. Justice Maclean.

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Sept. 15.

MOZHURUDDIN (DEFENDANT) v. GOBIND CHUNDER NUNDI
(PLAINTIFF).*

Landlord and Tenant—Forfeiture of Holding—Denial by a Tenant of his Landlord's Title.

A, a ryot with rights of occupancy, in a rent-suit brought against him by B, the purchaser of an *aima* (1) *mehal*, denied the existence of the relationship of landlord and tenant between himself and B, on the ground that the lands occupied by him were not included on the *aima mehal* purchased by B. B's rent-suit having been dismissed for failure of evidence on this point, B afterwards brought a regular suit to evict A, and for mesne profits. *Held*, that A, by denying the title of B, in the rent-suit, thereby forfeited his rights of occupancy, and became liable to eviction.

THIS was a suit instituted by the plaintiff Gobind Chunder Nundi to evict the defendant Sheikh Mozhuruddin, a ryot with rights of occupancy, from certain lands comprised within the boundaries of the *aima mehal* Pilshua, the purchased property

* Appeal from Appellate Decree, No. 1829 of 1879, against the decree of C. D. Field, Esq., Judge of East Burdwan, dated the 6th May 1879, modifying the decree of Baboo Janokinath Mookerjee, Munsif of Cutwa, dated the 31st January 1879.

(1) *Aima*.—Land granted by the charitable uses in relation to Mahomedan Government, either rent-free or subject to a small quit-rent, to learned or religious persons of the Mahomedan faith, or for religious and

medanism. Such tenures were recognised by the British Government as hereditary and transferable.—*Wilson's Glossary.*

of the plaintiff, and for a declaration that the occupancy-rights of the defendant were forfeited, on the ground that, in a rent-suit which had been previously instituted by the plaintiff against the defendant, the defendant had falsely denied the title of the plaintiff. The plaintiff also claimed mesne profits

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NUNDI.

It appeared that the plaintiff was the purchaser of the *aima mehal* Pilshua, at an auction-sale for arrears of Government revenue, and had obtained formal, but not actual, possession in June 1875. It was proved that the lands in dispute were included in the plaintiff's purchase; that the defendant had been in occupation of them as a ryot with rights of occupancy for a period of more than thirty years, and had paid rent to the former proprietor of the *aima mehal*, but had not, since the plaintiff's purchase, paid any rent to him. It was also proved that, in 1877, the plaintiff had sued the defendant for rent in respect of these lands; that in such suit the defendant had denied the plaintiff's title, alleging that the lands occupied by him were not included in the plaintiff's mehal, and that, in consequence of such denial, the suit was dismissed.

Upon these facts the Court of first instance held that the plaintiff was entitled to a decree for mesne profits for a period of three years, but not to evict the defendant, as the denial of the plaintiff's title by the defendant in the former suit might have been occasioned by mistake on his part.

From this decision the plaintiff appealed to the Judge of East Burdwan, who, on the 6th May, gave the following judgment:—
“I think there can be no doubt that the defendant being well aware of the plaintiff's title, denied it in the rent-suit. Now, a tenant who denies his landlord's title, and sets up an adverse title, is liable to be evicted. The Munsif says that ‘this might be that he considered the lands are lakheraj and not the *aima* sold to the plaintiff,’ and it is argued before me that the defendant was misled by the former proprietor of the *aima*, who also held lakheraj lands. Now, if this had been pleaded and proved, if it had been shown that the defendant, having made reasonable enquiries, was misled by the former *aimadar*, the Court might perhaps take this plea into consi-

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deration. But I do not find that any such plea was set up before the Munsif, and indeed no one appears to have thought of it until the Munsif suggested, without evidence, that this was so. I think, therefore, that the plaintiff is entitled to evict the defendant."

From this decision the defendant appealed to the High Court.

Mr. *G. Gregory* and Baboo *Omanath Bose* for the appellant.

Baboo *Ram Chand Mitter* for the respondent.

Mr. *G. Gregory* (Baboo *Omanath Bose* with him) for the appellant.—There have been cases in this country in which it was held that a ryot, who denies his landlord's title, forfeits his tenure; but those decisions seem to have followed English cases. In England a tenant forfeits his tenure because that is the common law of England, but the whole of the law of landlord and tenant in this country is comprised in Beng. Act VIII of 1869, and as the Legislature have not thought it proper to insert the provision in that law, the Courts are not competent to import into it a penal provision of that nature. In the previous cases here, it seems to have been assumed that the law here allows a forfeiture. In *Mahomed Basiroollah Bhoonia v. Ahmed Ali* (1), Mr. Justice Dwarkanath Mitter says: "It seems to me that it is by no means a settled point of law in this country that the denial by the tenant of the landlord's title works a forfeiture of the tenancy." In *Sutyabhama Dassee v. Krishna Chunder Chatterjee* (2), your Lordship, Mr. Justice Maclean, took precisely the view I am now contending for, but the decision was, on appeal under the Letters Patent, reversed. But the second decree turned on entirely different grounds, which do not exist in this case. I submit it is *ultrâ vires* of the Courts to establish a penal law of this nature without legislative authority. A reference to a Full Bench would, I submit, be a proper order to make in this case in order that the question may be raised and decided. Even in some of the cases decided here, it is said that the Courts, both here and in England, "always lean strongly against

(1) 22 W. R., 448.

(2) *Ante*, p. 55.

a forfeiture:" *Sreemutty Ahullya Debia v. Bhyrub Chunder Pattro* (1).

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Baboo *Ram Churn Mitter* for the respondent was not called upon.

The judgment of the Court (TOTTENHAM and MACLEAN, JJ.) was delivered by

TOTTENHAM, J.—The point pressed upon us by the learned counsel for the appellant is, that there is nothing in the law of this country warranting forfeiture of his holding as the penalty of denial by a ryot of his landlord's title.

The lower Appellate Court has decreed the defendant's (appellant's) eviction for denying the plaintiff's title, though well aware of it.

There are numerous reported cases in which this Court has affirmed similar decrees passed under the same circumstances, and there being no contrary ruling, we think that we are bound to follow these decisions, notwithstanding that the learned counsel has contended that the point was never really raised and decided in these cases, but that it was assumed that denial of the landlord's title rendered the tenant liable to be evicted. We are not at present prepared to take the opposite view, and to refer the case to a Full Bench. We may observe that the doctrine of forfeiture is not entirely unknown to the law of landlord and tenant in Bengal, for s. 38 of Beng. Act VIII of 1869 distinctly provides for it in the event of the Collector being unable, from the nonattendance of persons holding tenures and under-tenures, to ascertain them at the measurement of any lands under that section.

In the present case, we think we are supported by authority, and dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Maclean.

1880
Sept. 29.

IN THE MATTER OF THE PETITION OF KASI CHUNDER MOZUMDAR.

JUGGUT CHUNDER MOZUMDAR v. KASI CHUNDER
MOZUMDAR.*

Sanction to Prosecution for giving False Evidence—Criminal Procedure Code (Act X of 1872), s. 468—Jurisdiction to give Sanction—Case settled without Evidence—Duties of Judge—Prosecution for False Evidence on verified Petition, when such Verification is unnecessary.

The Courts that have jurisdiction to grant a sanction to proceedings under s. 468 of Act X of 1872, are the Court before which the offence was alleged to have been committed, and the Courts to which such Court is subordinate.

Per GARTH, C. J.—Where a case is settled without evidence being gone into, the Court in which the suit was brought, even if it have power to sanction criminal proceedings against any of the parties to such suit under s. 468 of Act X of 1872, is guilty of great impropriety and indiscretion in so doing, inasmuch as it can have had no opportunity of judging of the *bona fides* of the claim or defence.

Semle.—A petition presented under Reg. XVII of 1806 not requiring verification, cannot, from the fact of it being verified unnecessarily, be made the subject of a prosecution for giving false evidence.

THIS was an application to set aside an order of the District Judge of Pubna sanctioning a prosecution under the following circumstances:

On the 17th July 1868, one Juggut Chunder Mozumdar executed a mortgage of certain property in Rajshahye in favor of one Kasi Chunder Mozumdar, securing a certain sum of money with interest. On the 28th October 1878, the mortgagee presented, under Reg. XVII of 1806, a verified petition to the Court of Rajshahye for the foreclosure of the mortgage. Subsequently to the date of the petition this Rajshahye district was divided, and the land, the subject of the mortgage, was taken to form part of the district of Pubna. On the 15th December 1879, the mortgagor presented a counter-petition to the Court of Rajshahye, in which he stated that the mortgage-money had been paid in full (in support of which statement a registered receipt was filed, which

* Criminal Motion, No. 214 of 1880, against the order of C. D. C. Winter, Esq., Officiating District Judge of Pubna, dated the 22nd July 1880. *

on the face of it purported to show that the repayment had been made in 1869), and prayed that the property might be declared free from the mortgage charge. The mortgagee opposed that petition, and contended, that the money had, in point of fact, never been repaid, although it had been agreed and intended that it should be. On the 24th February 1880, the mortgagee presented another petition in the suit, stating that matters had been amicably settled, and praying that the petition in the foreclosure suit should be struck off the file. A decree by consent was accordingly drawn up and filed in accordance with the prayer of the petition.

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In July 1880, the mortgagor applied to the District Judge of Pubna for leave to prosecute Kasi Chunder Mozumdar (the mortgagee), under s. 193 of the Penal Code, for the statements made in the petition dated the 28th October 1878; and the District Judge, reviewing the proceedings which had taken place in the Rajshahye Court, and having regard to the registered receipt, gave his sanction to the criminal prosecution.

Kasi Chunder Mozumdar then applied to the High Court to set aside the order of the District Judge, and obtained a rule calling on the other side to show cause why the order should not be set aside.

Mr. M. M. Ghose and Baboo Kali Churn Bannerjee in support of the rule.—The Judge of Pubna had no jurisdiction to make the order, the false evidence (if any) was given in the jurisdiction of the Judge of Rajshahye; but assuming the order to be legal, the Judge had no sufficient evidence before him to justify the order. And further, inasmuch as the petition filed in October 1878 did not require to be verified upon affirmation or oath, the gratuitous verification could not render the petitioner liable to a conviction for giving false evidence under the Penal Code.

No one appeared to oppose the rule.

The judgment of the Court (GARTH and MACLEAN, JJ.) was delivered by

GARTH, C. J. (who, after stating the facts, continued):—The first ground upon which it is contended that the order is bad

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is, that the Judge of the Pubna Court had no jurisdiction to make it.

• Upon this ground alone it appears to me that the order is clearly illegal. The offence of which Kasi is said to have been guilty is that of giving false evidence in a judicial proceeding under s. 193 of the Penal Code, and he is said to have given this false evidence in the 4th paragraph of the petition which he filed in the District Court of Rajshahye in 1878. If this was an offence at all, it seems clear to me that the Court before which it was committed was the District Court of Rajshahye, and that, consequently, the only Court which could give sanction to any criminal proceeding under s. 468 of the Criminal Procedure Code was either the Judge of the District Court of Rajshahye, or some Court to which the Rajshahye Court was subordinate. The offence was certainly not committed before or against the District Court of Pubna, which was not in existence at the time when the alleged offence was committed.

The District Judge of Pubna appears to be under the impression that, because the land, which was the subject of the mortgage, has since been transferred to the jurisdiction of Pubna, the offence with which Kasi is charged must also be considered as having been committed before the District Court of Pubna. But this is clearly a mistake. The question is not within what jurisdiction the mortgaged property is now situate, but before what Court the offence was committed; and there is no doubt that the offence (if any) was committed before the District Court of Rajshahye. I think, therefore, that, upon this ground alone, the sanction given by the Judge of Pubna is illegal.

But it was further contended by Mr. Ghose that, even assuming the Judge to have had jurisdiction, he had no evidence or materials before him which would legally justify his making the order. It is not necessary for our present purpose to decide this further question; but as it is possible that another application of a similar nature may be made to the Rajshahye Court, I think it right, as the question has been raised, to express my views upon it.

In the case of *Barkatullah Khan v. Rennie* (1) it was held by

(1) I. L. R., 1 All., 17.

a Full Bench at Allahabad, that when the Court in which the evidence in a case has been given has, under s. 468 of the Criminal Procedure Code, sanctioned criminal proceedings, no superior Court has any right to question the propriety of that sanction. And in the case of *In the matter of the Petition of Ram Prasad Hazra* (1) it was held by a Full Bench of this Court, that where, in the course of a suit, a Civil Court commits a party for trial or sanctions criminal proceedings against him on a charge of perjury or forgery, the High Court cannot, as a Court of revision, reverse such sanction or order upon the ground that it was not warranted by the facts.

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There are also other cases to the same effect. But I do not understand any of these cases to go so far as to decide, that when a Court before which a case is pending sanctions criminal proceedings against one of the parties to that suit, before any evidence in the case has been given, and without any materials before it upon which it could properly exercise a discretion, the sanction cannot be set aside.

It seems to me that the reason of the rule laid down in s. 468 consists in this, that suitors in a Court of Justice ought to be allowed the fullest liberty of speech and action in support of their respective contentions, and so long as they use that liberty in good faith and honestly, they ought not to be subjected to malicious prosecutions.

The Court which has the best means of forming an opinion upon the *bona fides* of the parties and the truthfulness of the witnesses, is the Judge who hears the evidence, and therefore, upon that Court or upon some superior Court which has the power of looking into the proceedings, the law imposes the duty of sanctioning or refusing to sanction criminal proceedings against the parties or their witnesses.

But if a case is settled without any evidence being gone into it seems to me that the Court in which the suit was brought has no opportunity of judging of the *bona fides* of the claim or defence, and if it has any power at all under such circumstances, which I very much doubt, to give its sanction to criminal proceedings against either party, I think it would be guilty of a

(1) B. L. R., Sup. Vol., 426; S. C., 5 W. R., Mis. Rul., 24.

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great impropriety and indiscretion in so doing. In this particular case no evidence was gone into. The proceedings taken by the mortgagee in 1878 were instituted under Reg. XVII of 1806, which does not make it necessary that his petition should even be verified in the ordinary way. The suit was subsequently compromised by consent, each party paying his own costs; and it seems to me that as no evidence was given on either side, it was quite impossible for them to form anything like a correct judgment as to whether the mortgage-money had or had not been paid when the proceedings were instituted in 1878.

Then there was another point taken by Mr. Ghose, which I think, upon consideration, is entitled to some weight.

The petition presented by the mortgagee in 1878 did not require (as we have already seen) to be verified upon oath or affirmation. The petitioner was, therefore, not bound so to verify it, although in point of fact he did so; and Mr. Ghose's contention is, that unless the petitioner was legally bound to verify the petition, his verifying it gratuitously would not render him liable to conviction for giving false evidence or making a false claim; see ss. 191 and 193 of the Indian Penal Code.

An oath voluntarily taken in a proceeding where an oath is not necessary, would not, by the English law, support an indictment for perjury, and I should doubt whether, under the Penal Code, a statement upon oath, when the oath is not necessary, would come within the provisions of s. 191. But it is not necessary for our present purpose to decide that question.

The order of the District Judge, which sanctions the criminal proceedings, will be set aside on the first ground.

MACLEAN, J.—I concur in setting aside the proceedings on the ground that the Court of the Judge of Pubna and Bogra was not the Court before which the alleged offence was committed.

Order set aside.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Maclean.

IN THE MATTER OF THE PETITION OF CHANDRAKANTA DE.*

1880
Nov. 9.

Penal Code (Act XLV of 1860), s. 188—Injunction in Civil Suit—Disobedience of Order.

Section 188 of the Penal Code applies to orders made by public functionaries for public purposes, and not to an order made in a civil suit between party and party.

The proper remedy for disobedience of an order of injunction passed by a Civil Court, is committal for contempt.

THE case was sent up to the High Court by the Sessions Judge of Mymensing, for an expression of opinion on an order passed by the Magistrate of Mymensing on 29th April 1880, dismissing a complaint against Girijakanta Lahory and others for an alleged offence under s. 188 of the Penal Code.

The circumstances which led to the order were as follows:—

On the 21st August 1879 the District Judge of Mymensing, on regular appeal, passed a decree, directing "Girijakanta Lahory, the appellant, to refrain from excluding, as joint sharer, one Tarinikanta Lahory from any portion of a tank (the subject of litigation between the parties), and both parties from taking or giving any person exclusive possession of any portion thereof without the consent of the other of them."

On the same date the District Judge passed another decree "directing Girijakanta Lahory to refrain from excluding Tarinikanta from possession of two plots as a joint sharer, and both parties from taking or giving to any other persons exclusive possession of either of the plots without the consent of the other of them." Subsequently to the passing of these decrees, Tarinikanta Lahory presented a petition to the District Judge, stating that Girijakanta Lahory had disobeyed the injunction, and had erected a hut on the land contiguous to the tank, asking for permission to prosecute Girijakanta under s. 188 of the Penal Code.

* Criminal Reference, No. 182 of 1880, from the order made by T. M. Kirkwood, Esq., Judge of Mymensing, dated the 2nd October 1880.

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This was granted; and on the case coming up before the Magistrate on the 29th April 1880, he, without taking evidence as to the fact of the building of the hut, found that the order of injunction passed by the District Judge had not been promulgated, and expressed a doubt as to whether an order by a Civil Court was an order of a nature contemplated by s. 189 of the Penal Code, and therefore acquitted the accused under s. 211 of the Code of Criminal Procedure. The Sessions Judge disagreed with the view taken by the Magistrate, and referred the following points to the High Court for opinion:—

(i) Whether the Magistrate was right in holding that s. 188 of the Penal Code does not apply to disobedience of an order promulgated by a Civil Court?

(ii) Whether the Magistrate was right in holding that the order had not been adequately promulgated?

No one appeared for either party.

The opinion of the High Court (GARTH, C. J., and MACLEAN, J.) was given by

GARTH, C. J.—In our opinion s. 188 applies to orders made by public functionaries for public purposes, and not to an order made in a civil suit between party and party; so we think the Magistrate was right in refusing to act under the section.

If the defendant in the suit has disobeyed the injunction, the Judge ought, on the application of the plaintiff, to have sent him to jail for disobeying the Court's order; that was the proper remedy.

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Miller.

LALJEE SAHOO (PLAINTIFF) v. ROGHOUNUNDUN LALL
SAHOO (DEFENDANT).*

1880
Nov. 13.

Limitation Act (XV of 1877), s. 19, and sched. ii, art. 85—Acknowledgment of Debt due—Uncontradicted Acknowledgment of Debtor, not openly admitted by Creditor.

Article 85, sched. ii of Act XV of 1877, is intended to apply to cases where an account has been going on between two parties, and balances have been struck from time to time, showing the amount due from one of such parties to the other; and the suit to which that article is intended to apply is a suit brought by one of those parties against the other for the balance found to be due on that account.

A creditor who does not openly assent to an amount acknowledged by his debtor to be due to him, is nevertheless entitled to take advantage of such acknowledgment so long as it remains uncontradicted and unexplained by his debtor.

THIS was a suit brought on the 21st December 1877 to recover Rs. 17,590-3-6, principal and interest, due on an ikrar-nama, under the following circumstances:—

The plaintiff and defendant were members of the same family, and their ancestors carried on business as mahajuns, and owned a mahajani koti in Durbunga, which was known by the name of the Burra Koti. Subsequently the shareholders of eight annas of this business established a koti for themselves, which was called the Chota Koti; and these two kotis had mutual dealings with one another, independently of the business which they jointly carried on as mahajuns with the outside public.

On the 27th September 1871 the mahajani business with the public came to an end, but the accounts of the Burra Koti and Chota Koti as between themselves remained unsettled until the 23rd of November 1873, when the disputes between them were referred to arbitration.

* Appeal from Original Decree, No. 53 of 1879, against the decree of W. DaCosta, Esq., First Subordinate Judge of Tirhoot, dated the 12th December 1878.

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Although some discussions took place with reference to the accounts, no regular meeting of the arbitrators was ever held : but, on the 24th December 1874, an ikrarnama was executed, in which the sums due from the members of the Burra Koti to the members of the Chota Koti, are said to have been ascertained ; and upon this ikrarnama the claim of the plaintiff, who is a member of the Chota Koti, against the defendant, who represents the Burra Koti, is founded.

The parties who executed this instrument were the defendant Roghoonundun Lall Sahoo and his deceased father Bissessur Lall Sahoo, the members and representatives of the Burra Koti. It recited the disputes which had arisen between the members of the Burra Koti on the one hand, and the plaintiff and Roghubur Sahoo and Ram Golam Sahoo, the members of the Chota Koti, on the other ; it further recited that an arbitration agreement had been drawn up, but had not been carried out, and that disputes with regard to their monetary dealings with one another had been settled on the basis, that up to the previous day, the 30th Aughran 1282 (corresponding with 23rd December 1874), there was found due to the members of the Chota Koti from the members of the Burra Koti the sum of Rs. 53,951-10-3. It further recited that the sum of Rs. 16,793-6-6 had been found due from the Chota Koti to the Burra Koti, and that, after setting that off against the Rs. 53,951-10-3, the balance, being the sum of Rs. 37,158-3-9, was due from the Burra Koti to the Chota Koti. Of this amount, Rs. 24,772-2-6, being two-thirds of the Rs. 37,158-3-9, were declared to be due to Roghubur Dyal Sahoo, Ram Golam Sahoo, and Turban Lall Sahoo, in respect to which they had executed a separate deed of assent to the ikrarnama in favor of the members of the Burra Koti, and the remaining sum of Rs. 12,386-1-3 was declared and acknowledged by Roghoonundun Lall Sahoo and Bissessur Lall Sahoo to be due from them to the plaintiff.

The Subordinate Judge found that the suit should have been brought within three years from the close of the year in which the last item in the accounts between the parties had been admitted or proved. The last admitted item bearing date the 27th September 1871, he held, that the suit was .

barred under s. 85, sched. ii, of Act XV of 1877, inasmuch as the ikrarnama had been executed on the 24th December 1874, at a time when limitation had already expired, and therefore such an ikrarnama could not be said to be an acknowledgment of the debt due under s. 19 of the Limitation Act.

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The plaintiff appealed to the High Court.

Mr. *Phillips* and Baboo *Chunder Madhub Ghose* for the appellant.

The *Advocate-General* (Mr. *Paul*) and Baboo *Hem Chunder Banerjee* for the respondent.

The judgment of the Court (GARTH, C. J., and MITTER, J.) was delivered by

GARTH, C. J. (who having stated the facts continued):—We think that the lower Court has made a mistake in this case.

The plaintiff says in his plaint that he was a party to the adjustment of accounts which resulted in this deed of settlement, but he has not been called as a witness, and it has not been proved that he was actually a party to that adjustment. This suit was brought just within the three years from the time when that deed was executed, and it was contended by the plaintiff in the Court below, that this deed was a sufficient admission of a debt due from the defendant to the plaintiff to prevent the suit being barred by limitation.

The Subordinate Judge, however, considered that the case must be governed by art. 85, sched. ii, div. i, of the Limitation Act of 1877, which provides for a suit brought “for the balance due on a mutual, open and current account, when there have been reciprocal demands between the parties,” and as in that case the period of limitation would run from the close of the year in which the last item admitted and proved is entered in the account, he considered that the limitation would run in this case from the end of the year 1871, in which year the last item of Rs. 2,000, placed to the credit of the members of the Chota Koti, appears to be entered under date 27th September 1871. As the case fell under this article, and the limitation ran from

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the end of 1871, the lower Court held the plaintiff's suit to be barred. We consider that, in dealing with the case in this way, the lower Court has misapprehended both the nature of the suit and the true meaning of art. 85 in the Limitation Act.

That article, as it seems to us, is intended to apply to cases where an account has been going on between two parties and balances have been struck from time to time showing the amount due from one of such parties to the other; and the suit to which that article is intended to apply, is a suit brought by one of those parties against the other, for the balance found to be due to him on that account.

It seems to us that this is a suit of a totally different nature. It is not brought to recover the balance due upon any account at all; it does not appear that in the accounts which were kept between these parties there were ever any balances struck, or that any balance was ever found to be due to the plaintiff upon that account. On the contrary, we must presume that the parties to that account would be the members of the Burra Koti on the one hand, and of the Chota Koti on the other, and it would be quite inconsistent with the nature of such an account that any balance should be found due on that account to the plaintiff separately.

The plaintiff's real claim, as it seems to us, consists in this:—At the time when the mahajani business ceased,—i.e., in the year 1871,—disputes were going on between the members of the Burra Koti and those of the Chota Koti with reference to their unsettled accounts. They had been carrying on at that time a partnership business, in which certain members of the partnership had had separate transactions with the other members of the partnership. Whilst these disputes were pending, it was competent, of course, for the members of either koti or for any one of these members, making all the other members of the partnership parties, to institute a suit for an account, and until the accounts had been adjusted and a particular sum found due to one of the members from all or some of the other members, no member could have brought a separate suit for a specific sum such as the plaintiff claims in the present case. The plaintiff, as we take it, could only bring the suit to recover the sum,

which he claims here, upon an adjustment of account having taken place, the result of which was, that a debt was found due from one or more of the other members of the concern to himself.

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But his case is, that such an adjustment of account has in fact taken place, and that the ikrarnama of the 24th December 1874 is of itself sufficient evidence of it.

It was contended before us in the first instance, that the admission made by the defendant in the ikrarnama of 24th December 1874 amounted, in fact, to an account stated with the plaintiff; and if that were so, of course the account stated would be itself sufficient to enable the plaintiff to maintain an action. But in order to make it an account stated, the plaintiff himself must have been a consenting party to it; and there is certainly no evidence that he was a consenting party to it. On the contrary, it would appear from the latter portion of the ikrarnama that the other three persons who constituted the Chota Koti with the plaintiff had assented to the ikrarnama and had given a deed to the members of the Burra Koti to confirm their assent, but that the plaintiff had not done so. We think, therefore, that the plaintiff has not established any case upon an account stated.

But then it was argued by Mr. Phillips that the ikrarnama at least amounts to this; to an admission by the members of the Burra Koti that they had adjusted accounts with the members of the Chota Koti, including the plaintiff; and that, upon such adjustment of accounts, they acknowledged that a sum of Rs. 12,386-1-3 was due to the plaintiff. Whether the plaintiff himself was a party to that acknowledgment does not appear, but the deeds of the 24th of December 1874, and the other deed, which was executed by the three members of the Chota Koti, amount, at any rate, to an acknowledgment by all the other members of both concerns, except the plaintiff, that the plaintiff is entitled to receive the sum found to be due to him from the defendant.

We think that this contention is well founded. It does not appear when the adjustment took place, but I think the ikrarnama is sufficient evidence as against the defendant, especially

1880 as it is uncontradicted and unexplained, that the sum of
 LALJEE Rs. 12,386-1-3 is a separate debt acknowledged to be due by the
 SAHOO defendant to the plaintiff at some time prior to the date of the
 v. ikarnama.
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But then it is said that, as no time is shown when the adjustment took place, and consequently when the separate debt first had an existence, it is improper to say that the ikarnama, which contained an acknowledgment of the debt, was made within three years of the time when the debt first arose; but the answer to this argument appears to us to be patent upon the evidence.

As long as the account remained unsettled and no adjustment took place, it is clear that the separate debt, for which the plaintiff now sues, could have had no existence; and it appears from the evidence of the plaintiff's first witness, that those disputes were unsettled and were referred to arbitration so lately as the 23rd November 1873. The adjustment of accounts, therefore, must have taken place, and the separate debt due to the plaintiff by the defendant must have had its origin, at some time between the 23rd November 1873 and the 24th of December 1874. The acknowledgment, therefore, which was made on the 24th December 1874 in the ikarnama, was made within three years from the time when the debt first accrued due; this acknowledgment would be clearly sufficient under s. 19 of the Limitation Act, and it was made within three years from the commencement of this suit.

It may then be said, that the plaintiff, by never openly assenting to the amount of the debt thus acknowledged to be due to him by the defendant, has placed it out of his power to take advantage of it now; but we think that he has a right to take advantage of it at any time, so long as the acknowledgment of the debt remains uncontradicted and unexplained by the defendant. Assuming that the execution of the ikarnama was unknown in the first instance to the plaintiff, still if he afterwards became aware of it, and communicated to the defendant, as he did at any rate by bringing this suit, that he had assented to the adjustment, unless the defendant repudiated or explained away the admission that he had made, we consider that the

plaintiff is entitled to take advantage of that admission in this suit.

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We think, therefore, that the plaintiff is entitled to recover the amount admitted by defendant to be due, and the only question that remains is as to interest. With regard to this, as it does not appear that the plaintiff took any steps to enforce his claim, or to take advantage of defendant's admission, before he brought this suit in December 1877 we do not think that he ought to be entitled to any interest up to that time. But from the commencement of the suit to the date of decree we think that he should be entitled to interest at 12 per cent, and from that time till payment to the usual 6 per cent. He should also obtain his costs in proportion to the amount recovered in both Courts.

Appeal allowed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Field.

HURRI PRASAD (PLAINTIFF) v. JAUMNA PRASAD AND ANOTHER
(DEFENDANTS).*

1880
Nov. 26.

*Survey Proceedings—Beng. Act V of 1875, s. 45, cl. (b), and s. 62—
Survey Proceedings not taken for public purposes—Right of Suit.*

Section 45, cl. (b) of Beng. Act V of 1875 applies only to a survey or some similar proceeding taken by a revenue officer "for some public purpose," and against which any party who may be affected by the boundary laid down by such officer would have a right to object.

Therefore, where such a proceeding, although initiated under Beng. Act V of 1875, has been taken for the purpose of settling the boundaries of private property as between the owners of it, the party aggrieved by the order of the Collector in such proceeding is not debarred by s. 62 of the Act from bringing a suit in the Civil Court to have the boundaries ascertained.

THIS was a suit brought for the purpose of having the plaintiff's right and possession in three bighas one cotta of land declared, and certain boundary pillars removed, and a map, sanctioned by a Collector, rectified.

* Appeal from Appellate Decree No. 2151 of 1879, against the decree of Baboo Koylash Chunder Mookerji, Subordinate Judge of Bhagalpore, dated the 26th August 1879, affirming the decree of Moulvi Mahomed Nurul Hosain, Khan Bahadur, Munsif of that district, dated the 26th March 1879.

1880 The plaintiff and defendants were owners and proprietors of
 HURRI adjoining lands, and it appeared from the proceedings filed, that
 PRASAD some time previous to the institution of the present suit, an
 v. application had been made by the present defendants to a
 JAUMNA Collector under the Bengal Survey Act (V of 1875) for a
 PRASAD. settlement of the boundary of their estate, and that the Collector,
 in pursuance of such application, had settled the boundaries and
 sanctioned a map. The plaintiff alleged, in the present suit,
 that this boundary was erroneous, and that it had the effect of
 depriving him of three bighas and one cotta of land, transfer-
 ring it to the defendants, and that the real boundaries had been
 correctly ascertained in a suit between himself and the father
 of the defendants; he therefore brought this present suit for the
 purposes above-mentioned.

The Munsif decided in accordance with the contention raised by the defendants, that, inasmuch as the plaintiff had not preferred an appeal against the proceedings, under Beng. Act V of 1875, taken by the Collector, he was therefore debarred by the provisions of s. 62 of Beng. Act V of 1875 from bringing this suit in the Civil Court. He accordingly dismissed the suit.

The plaintiff appealed to the Officiating Subordinate Judge, who upheld the decision of the Munsif.

The plaintiff then appealed to the High Court.

Baboo Amarendro Nath Chatterjee for the appellant.

Baboo Rajendro Nath Bose for the respondents.

The arguments used are sufficiently set out in the judgments of the Court.

The following judgments were delivered :—

GARTH, C. J.—The plaintiff, who is the owner of Mouza Mokimpore, brings this suit for the purpose of having a certain boundary ascertained between his mouza and the mouza at Chuck Gopal, which belongs to the defendants.

He says, that this boundary was determined in a suit which he

brought against Roghubar Singh and others, the proprietors of the defendants' mouza, to which Lalji Sahu, the father of the defendants, was a party.

In answer to this claim the defendants' case is, that they had made an application to the Collector, under Beng. Act V of 1875, to have the boundary between the plaintiff's land and their own laid down in accordance with the map made in a butwara-proceeding, which took place many years ago between the proprietors of the defendants' mouza.

The defendants further say, that, upon the application so made by them to the Collector, the boundary was laid down by an Ameen in the first instance; that the plaintiff appeared and made objections to it; that eventually the Collector made an order laying down the boundary in accordance with the Ameen's views; and that the plaintiff has not appealed against the decision of the Collector, as he should have done (see s. 62 of the said Act), before he could bring this suit.

The lower Courts apparently considered, that the case depended upon whether the proceedings of the Collector were regular or not, and whether by reason of s. 62 the plaintiff's suit was barred; and they both decided that the order of the Collector was binding upon the plaintiff, and that he had no right (under s. 62), not having appealed against the Collector's order, to bring this suit.

It has now been contended before us, that the order of the Collector is not binding upon the plaintiff at all; that the Collector had no jurisdiction under the circumstances to enter upon the enquiry; and that, although the plaintiff may have taken part in the proceedings, the order of the Collector was not binding upon him.

The defendants, on the other hand, contended that the proceedings of the Collector were perfectly legal.

First they say, that the case was one coming under the provisions of those sections of the Act which immediately precede s. 45. But I think that this is clearly not so. In order to bring the case within those sections, it must appear that there was a survey going on under s. 3, and that the order of the Collector had been made under the survey-proceedings.

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Then, secondly, they say, that under s. 45 the Collector has power to lay down a boundary in any one of these three cases:—

(a) Where the boundary has been determined by a competent Court; or (b) where it has been laid down on a map in the course of a previous revenue survey or settlement or other proceeding of a revenue officer for any special purpose, and against which no objection has been preferred to any authority competent to decide upon such objection; or (c) where it has been laid down by a survey under this Act.

In any of these cases the Collector may, if he thinks it desirable that the boundary so laid down shall be relaid, proceed to relay it in the manner prescribed by s. 44. The defendants say that the boundary which the plaintiff desires to have ascertained in this suit is one which has been determined by a competent Court, because it was determined in the suit between himself and certain of the proprietors of the defendants' mouza, of whom the defendants' father was one. But the boundary which the Collector was asked to lay down was not the boundary which was determined in that suit between the plaintiff and the proprietors of the defendants' mouza; on the contrary, it was a very different one, which was laid down, not in that suit, but in the butwara-proceedings, which took place between the several proprietors of the defendants' mouza and to which the present plaintiff was no party.

Then it is said that the case comes within cl. (b) of s. 45, because the defendants' alleged boundary was laid down in the butwara, which was a proceeding taken by a revenue officer for a special purpose.

But in my opinion this is not so. I consider that cl. (b) applies only to a survey or some similar proceeding taken by a revenue officer for some public purpose, and against which any party who may be affected by the boundary laid down by such officer would have a right to object. The latter part of the clause clearly points to this, because, speaking of the boundary, it says, "against which no objection has been preferred to any authority competent to decide such objection."

Now the defendants' butwara was not a proceeding taken for any public purpose. It was taken for the purpose of a division

of private property as between the owners of it; and the boundary which was laid down was one to which neither the plaintiff, nor any other person besides those interested in the defendants' estate, had any right to object.

For these reasons I think that the Collector had no power, under Act V of 1875, to determine the boundary laid down in the butwara-proceedings so as to bind the present plaintiff; and therefore the latter is not prevented from bringing this suit by s. 62.

Then, lastly, the defendants contend, that even assuming the proceedings of the Collector to have been invalid under that Act, as the proceedings were taken at the instance of one of the parties and acquiesced in by the other, who took a part in them, his decision between them ought to be binding as an award. But the plaintiff was clearly no party to the proceedings in that sense. He objected to the boundary laid down by the Ameen, because he was under the impression that the Collector had a right by law to decide the boundary; but there is no reason whatever for supposing that he intended to leave the matter to be determined by the Collector as a private and independent arbitrator.

I think, therefore, that the plaintiff has a right to bring this suit in order to have the boundary laid down in the present suit ascertained.

The judgments of both the lower Courts will be reversed; and the case must go back to the Munsif's Court for retrial. The costs in all the Courts will abide the ultimate result.

FIELD, J.—The plaintiff in this case is the proprietor of Mouza Mokimpore. The defendants are the proprietors of Mouza Chuck Gopal. It appears that, at sometime previous to the institution of this suit, an application had been made to the Collector professedly under "The Bengal Survey Act" (V of 1875). The Collector, professing to proceed under this Act, laid down a boundary between Mouza Mokimpore and Mouza Chuck Gopal.

The plaintiff alleges that this is an erroneous boundary, and that it has the effect of taking away from Mouza Mokimpore

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three bighas one cotta and $14\frac{1}{2}$ dhurs of land, and transferring this portion of land to Mouza Chuck Gopal, to which, according to his contention, it does not belong. He therefore asks that his right and possession in these three bighas one cotta and $14\frac{1}{2}$ dhurs of land may be declared; that the boundary pillars erected under the Survey Act may be removed; and that the map, upon which this boundary has been marked, may be rectified.

In the lower Courts it was objected that the proceedings of the Collector were not in strict conformity with the provisions of Beng. Act V of 1875; and further, that as the plaintiff had preferred no appeal to the revenue authorities, he is debarred by the provisions of s. 62 of the Act from bringing this suit in the Civil Court.

If the Collector had jurisdiction, and in the exercise of that jurisdiction committed certain irregularities of procedure, that is a matter which must have been rectified by an appeal to the superior revenue authorities. It becomes, therefore, unnecessary to say anything further upon this first question.

In order to decide the second question, it becomes necessary to consider, in the first place, whether the Collector had, under the provisions of Beng. Act V of 1875, any jurisdiction whatever to deal with the question of the boundary between Mouza Mokimpore and Mouza Chuck Gopal.

The jurisdiction given to the Collector in boundary disputes by Beng. Act V of 1875 is a limited one. When the Collector is engaged in the survey of a district, or portion of a district, which has been authorized by the Lieutenant-Governor under s. 3 of the Act, he has then power under s. 40 to deal with boundary disputes arising and necessary to be determined in the course of such survey.

It is perfectly clear that no such survey was being conducted in the present case, and that, therefore, the provisions of ss. 40 to 44 have no application.

We come then to s. 45. It was at one stage of the argument contended, that the Collector in laying down this particular boundary was merely laying down a boundary which had been determined by a Civil Court in a previous case; in fact

the case referred to in s. 2 of the defendants' written statement. But on a reference to the application made to the Collector and to his proceedings, it is quite clear that the Collector never intended, and did not proceed, to lay down any boundary which was determined by the Civil Court in that suit.

The respondents' pleader then contended, that cl. (b) of s. 45 is applicable, and that what the Collector was really doing was relaying the boundary determined in previous butwara-proceedings.

It is clear, however, that those butwara-proceedings were only for the purpose of partitioning Mouza Chuck Gopal between the proprietors thereof, and that the boundaries which the Collector had jurisdiction to determine in those proceedings were only the boundaries of the respective shares of the proprietors of that mouza. The Collector had not, and could not have, under the law, any power to determine the boundary between Mouza Chuck Gopal and Mouza Mokimpore. It is therefore impossible to say that this boundary was determined in the butwara-proceedings, and that the Collector was, under cl. (b) of s. 45 of Act V of 1875, proceeding to relay the boundary so determined.

It is clear, therefore, to my mind that, upon the application made to the Collector, he had no jurisdiction under the Act of 1875 to proceed to relay the boundary between Mouza Chuck Gopal and Mouza Mokimpore. I am also of opinion, that the submission of the plaintiff to the proceedings erroneously taken under Act V of 1875, could not give to the Collector a jurisdiction not conferred on him by the Act. I agree, therefore, in setting aside the judgments of the lower Courts and in remanding the case to the first Court for trial upon the merits.

Appeal allowed—Case remanded.

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Before Mr. Justice White and Mr. Justice Field.

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NOBEEN CHUNDER SIL AND OTHERS v. BHOBOSOONDURI DABEE.*

Probate—Caveat—Interest of Attaching Creditor—Next-of-kin—Mortgagees—Succession Act (X of 1865), s. 234, illus. (b), s. 242—20 and 21 Vict., c. 77, s. 61.

A, a judgment-creditor, attached certain property as belonging to B, his debtor. B was the next-of-kin of C, deceased. The widow of C applied for probate of an alleged will of her husband. On *caveat* entered by A,—*held*, that he had such an interest as entitled him to oppose the grant.

D held a mortgage from B, executed subsequently to C's death, of other property, which the widow also alleged formed part of her husband's estate. On *caveat* entered by D,—*held* also, that he had such an interest as entitled him to oppose the grant.

Per FIELD, J.—Under s. 242 of the Succession Act, any person who can show that he is entitled to maintain a suit in respect of property over which probate would have effect, possesses a sufficient interest to entitle him to enter a *caveat* and oppose the grant.

THE facts of the case relevant to this report sufficiently appear in the judgments of the Court.

Baboo Sham Lall Mitter and Baboo Mohun Chand Mitter for the appellants.

Baboo Ambica Churn Ghose for the respondent.

The following judgments were delivered :—

WHITE, J.—This is an appeal against a decree of the District Judge of the 24-Pargannas, granting probate of the will of Nobo Coomar Ganguli, deceased, to Bhobosoonduri Dabee, the respondent, who is his widow and executrix.

The testator died on the 21st October 1877, and left, besides his widow, two sons, Parbutti Churn Ganguli, an adult, and Hori Churn Ganguli, a minor. The will purports to give the entire property of the testator to his widow for her life, and after her

* Appeal from Original Decree, No. 213 of 1879, against the order of A. T. Maclean, Esq, Judge of 24-Pargannas, dated the 25th of April 1879.

death to his sons. It thus postpones the inheritance of the sons until after their mother's death.

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Nobeen Chunder Sil, the appellant No. 1, claims to have obtained in 1878 a money-decree against Parbutti Churn Ganguli for a private debt of his, and, on the 4th of February 1879, which was about a month before the will was propounded, to have attached the share of Parbutti in the immoveable property left by the testator.

The remaining two appellants, Brojo Mohun Ghose and Obhoy Churn Sen, claim, under a mortgage executed by the two sons of the testator about a month after his death, to be the mortgagees of the immoveable property left by the testator.

The three appellants filed a *caveat* against the grant of probate, but the District Judge, on the authority of a decision of this Court—*Bairnath Shahai v. Desputty Singh* (1)—refused to allow them to take part in the proceedings or oppose the grant.

The question before us is, whether, supposing the appellants to prove that they have the interests which they claim, they or either of them have such interests in the estate of the deceased as entitle them to file a *caveat* and oppose the grant?

It is not necessary to consider whether the case cited by the District Judge is good law, for it does not determine the question with which we have to deal. In that case the parties opposing the probate were simple creditors of a person who was the heir of the deceased, supposing the testator had died without a will, and supposing also that he had not adopted a son. In the present case the appellants have a claim upon the immoveable property left by the testator,—two of them as mortgagees of the persons who, if the testator left no will, are entitled to create the mortgage, and one of the appellants as the attaching creditor of one of these persons.

In the search which I have been able to make in the English reports and text-books, I can find no cases, and therefore no decision, in which persons standing to the deceased's estate in the relation in which the appellants respectively stand have entered *caveat* or applied to revoke grants. Probate and administrations in England only affect personal property, and no title to such

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property can be made without the act of the executor or administrator. It is plain that mortgages by the next-of-kin of their shares in the deceased's personal estate, before distribution of the assets by the executor or administrator, if they ever occur there, must be of extreme rarity. It is almost beyond the bounds of probability that a party would before probate take from the next-of-kin an assignment of their interest in the estate as upon an intestacy; or that, if he did, he would not fortify his title by making the next-of-kin execute a power-of-attorney authorizing him to oppose probate in their name. In this country, however, probate has effect over all the property of the deceased, both moveable and immoveable (s. 242 of the Indian Succession Act, 1865), and everything that is capable of assignment is, according to the habits and practice of the people of this country, constantly being assigned, quite irrespective of whether the title is inchoate or imperfect, doubtful or bad.

It cannot be disputed that the appellants have a direct interest in disputing the will. They allege that the will is a forgery, and has been concocted for the purpose of overriding their mortgage and attachment. The authorities show that, so long as the probate remains unrevoked, the attaching creditor could not bring the attached property to sale, nor could the mortgagees by any suit get the benefit of their mortgage. Their proceedings in each case would be defeated by the production of the probate, for they could not raise the issue that the will was forged. "A probate unrevoked," says Mr. Justice Williams in Vol. I Williams on Executors, 7th edition, p. 549, "is conclusive both in the Courts of law and equity, not only as to the appointment of executors, but as to the validity and contents of the will, so far as it extends to personal property." As a probate in India extends to immoveable property, the doctrine applies in this country to all the property left by the deceased. The only grounds on which the appellants could impeach the probate in a Civil Court would be those stated in the 44th section of the Indian Evidence Act, namely,—that the probate was granted by a Court not competent to grant it, or that it was obtained by fraud or collusion, which means fraud or collusion upon the Court, and perhaps also fraud upon the person disinherited by the will—

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Barnesly v. Pöwel (1); but they could not show that the will was never executed by the testator or was procured by a fraud practised upon him. It is obvious, therefore, that, unless the appellants have a *locus standi* in the Probate Court, they are without remedy, supposing their case against the will to be true.

Markby and Prinsep, JJ., in *Komollochun Dutt v. Nilruttun Mundle* (2), have virtually decided the question before us, so far as the mortgagee-appellants are concerned. The plaintiff there had purchased from a widow an estate which she was supposed to have inherited from her husband. Afterwards the brother of the husband obtained and produced at the trial probate of a will of the husband, by which he bequeathed the whole property to his brother. The plaintiff sued to recover the property from the possession of the brother, alleging that the will was a forgery. This Court reversed a remand order of the District Judge, which directed the first Court to try the question of the genuineness of the will, and directed that the trial should be postponed in order that the plaintiff might apply to the Probate Court of the District Judge to revoke the grant of probate.

Markby, J., apparently based his decision upon the language of s. 242 of the Indian Succession Act. But that section, whilst stating that the probate shall be conclusive as to the representative title, is silent as to its effect with respect to the validity and contents of the will. Its conclusive effect in the latter respects is really the legal consequence of the exclusive jurisdiction of the Court of Probate, as stated by Mr. Justice Williams in Vol. I, Williams on Executors, p. 549. In the mofussil the District Judges are the sole Courts of Probate, and it would be obviously inconsistent with the exclusive jurisdiction conferred upon them, that probates until revoked should not be conclusive as to the due execution of the will to which the grants relate.

The mortgagee-appellants in the present case stand substan-

(1) 1 Ves., Sen, 119, 284.

(2) I. L. R., 4 Calc., 360.

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tially in the same position as the plaintiff in *Komollochun Dutt v. Nilruttun Mundle* (1); they are purchasers *pro tanto* and assigns of the immoveable estate of the deceased, although only for the limited purpose of securing money which they have advanced to the testator's heirs. If, according to the authority just cited, they might apply to revoke the probate that has issued, it follows that they may also enter *caveat* and oppose the grant.

The case of an attaching creditor of the next-of-kin was not before the Court in *Komollochun Dutt v. Nilruttun Mundle* (1), but Markby, J., intimated an opinion that an attaching creditor was also entitled to apply to revoke probate. This point has been recently decided in favour of the attaching creditor in *Umanath Mookhopadhya v. Nilmoney Singh* (2).

I am of opinion, therefore, that the appellants claim respectively such interests in the estate of the deceased as entitle them, upon proof of their interests, to file a *caveat* and oppose the grant of probate of the will of Nobo Coomar Ganguli, deceased.

As the Court below in effect dismissed their *caveat* without deciding whether they had the respective interests which they claim, it will be necessary for them to prove those before being allowed to oppose.

The appeal is allowed, the decree of the lower Court is set aside, and the case remanded for trial on the merits, upon proof being first given by the appellants of the respective mortgage and attachment. The costs of the first trial and of the trial on the remand to abide the result of the remand.

FIELD, J.—In this case one Bhobosoonduri Dabee applied to the Court of the District Judge of the 24-Pargannas for probate of a will said to have been executed by her deceased husband Nobo Coomar Ganguli. A *caveat* was lodged by three persons, Nobeen Chunder Sil, Brojo Mohun Ghose, and Obhoy Churn Sen. Brojo Mohun Ghose and Obhoy Churn Sen claimed to come in and see the proceedings and oppose the grant of probate, on the ground that the testator's sons Par-

(1) I. L. R., 4 Calc., 360.

(2) *Ante*, p. 429.

butti Churn Ganguli and Hori Churn Ganguli had mortgaged to them a portion of the property which belonged to the deceased Nobo Coomar Ganguli, and which would have descended to these sons, the heirs, according to Hindu law, if Nobo Coomar Ganguli had died intestate.

Nobeen Chunder Sil obtained a decree for a private debt against Parbutti Churn Ganguli, and in execution thereof attached Parbutti Churn's share in the property before the will was propounded.

The learned District Judge of the 24-Pargannas, upon the authority of the case of *Baijnath Shahai v. Desputty Singh* (1), held, that these three caveators were not entitled to see the proceedings and oppose the grant of probate.

The contention of all three caveators is substantially this, that the sons of Nobo Coomar Ganguli had, upon their father's death, inherited his property and mortgaged it to Brojo Mohun and Obhoy Churn; and that the will propounded by Nobo Coomar's widow is a forgery, and has been concocted for the purpose of defeating the rights of the mortgagees and the creditors of the sons.

With respect to Brojo Mohun Ghose and Obhoy Churn Sen the case stands thus: These two persons are mortgagees, and being assignees of Nobo Coomar's sons, may be said to stand in the shoes of these sons. If the contention of these two persons is true,—namely, that Nobo Coomar died intestate, and that the will propounded by his widow is a forgery, concocted for the purpose of perpetrating a fraud upon them,—it becomes an important question to consider whether they have not such an interest as will enable them to show that the will is a forgery, and has been manufactured for the purpose of practising a fraud upon them; and *secondly*, whether they are entitled to show this in the probate proceedings before the District Judge, or have the right to show it in a suit framed for the purpose and instituted in a different Court.

In the case of *Komollochun Dutt v. Nilruttun Mundle* (2) it has been held by Markby and Prinsep, JJ., that the grant of probate is the decree of the District Judge, which cannot be

(1) I. L. R., 2 Calc., 208.

(2) I. L. R., 4 Calc., 360.

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questioned or set aside in any other Court of inferior jurisdiction. In that case two brothers were joint proprietors of certain property. One of them died childless, leaving his widow him surviving. This widow sold her interest in her husband's estate to one Nilruttun Mundul. After this sale the surviving brother propounded a will said to have been executed by his deceased brother. Probate of this will was obtained in the Court of the District Judge. Nilruttun subsequently sued to recover the widow's share of the property, alleging the will to be a forgery. Markby, J., referring to, and approving of, the case of *Mayho v. Williams* (1), held, that the validity of the will could not be questioned in the Court of the Subordinate Judge, and that the proper course for Nilruttun was to apply to the District Judge to revoke probate of the will. Nilruttun's appeal was accordingly adjourned to enable him to make an application to the District Judge for revocation of the probate. Markby, J., said that "the grant of probate is the decree of a Court which no other Court can set aside except for fraud or want of jurisdiction, and no such ground is alleged here."

So far as the facts of the case appear from the published report, I am myself unable to understand this observation. Nilruttun contended that the will was a forgery. There was no suggestion that the surviving brother had propounded and obtained probate of a forged will, being in ignorance of the fact of its being forged, and if, knowing the will to be forged, he propounded it in the Court of the District Judge for the purpose of obtaining probate accordingly, it is difficult to see that fraud was not practised upon the Court of the District Judge.

In the case now before us the caveators, Brojo Mohun Ghose and Obhoy Churn Sen, allege that the will is a forgery, and has been concocted by the widow and her sons in collusion for the purpose of defeating the rights of them, the mortgagees. This is a case which appears to stand on all fours with the case of *Komollochun Dutt v. Nilruttun Mundle* (2); and if these caveators are unable to contest the validity of the will in

(1) 2 All. H. C. Rep., 268.

(2) I. L. R., 4 Cal., 360.

another Court, and are also precluded from coming in to see the probate-proceedings and opposing the grant of probate, it is clear that they will be entirely without a remedy.

In the case *Bajinath Shakai v. Desputty Singh* (1) the persons who opposed the grant of probate had not lodged a *caveat*, and they were merely creditors of the next-of-kin of the deceased. I think that there can be no doubt that such "persons were not persons claiming to have an interest in the estate of the deceased" within the meaning of s. 250 of the Indian Succession Act (X of 1865). In *Komollochun Dutt v. Nilruttun Mundle* (2), Markby, J., drew a distinction between a mere creditor of the next-of-kin and a purchaser or assignee of the next-of-kin, and observed that a purchaser or assignee would be in a very different position from a creditor of the next-of-kin. Following the authority of this case, I think that Brojo Mohun Ghose and Obhoy Churn Sen, being mortgagees of the sons of the alleged testator, are entitled to come in and see the proceedings and contest the grant of probate.

According to the law of England, the grant of probate of a will has always been conclusive as to the validity of the will, so far as personal property is concerned. Repeated attempts were made to induce the Court of Chancery to assume a jurisdiction which would have infringed this principle. In the case of *Allen v. M'Pherson* (3) a bill was filed to have the executors of a will declared trustees for one *R. A.* to the amount of certain bequests which had been made in the will and certain codicils, but revoked by a later codicil. The ground upon which relief was asked was, that this last codicil had been executed under undue influence of the residuary legatee and false representations made at her instance respecting *R. A.*'s character. It was decided (*dissentientibus* Lord Cottenham, Chancellor, and Lord Langdale, M. R.) that the Court of Chancery had no jurisdiction in the matter, and that the proper course would have been an appeal to the Judicial Committee of the Privy Council against the sentence of the Ecclesiastical Court.

In the case of *Meluish v. Milton* (4) a wife had, as sole exe-

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(1) I. L. R., 2 Calc., 208.

(3) 1 H. L. Cas., 191.

(2) I. L. R., 4 Calc., 360.

(4) L. R., 3 Ch. D., 27.

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cutrix, obtained a grant of probate, and it was held that the Court of Chancery had no jurisdiction to entertain a bill to have her declared a trustee for the heir-at-law and sole next-of-kin, on the ground that she was not the lawful wife of the testator, as she had a former husband living, and that as the will was made in favor of the *wife*, she was not entitled to take the property under this will.

There are numerous other cases which establish the position that a grant of probate is, so far as regards personal estate, conclusive as to the genuineness of the will of which probate is granted.

In 1857 it was enacted by the Court of Probate Act, 20 and 21 Vict., c. 77, s. 61, that "where proceedings are taken for proving a will in solemn form, or for revoking the probate of a will on the ground of the invalidity thereof, or where, in any other contentious cause or matter under this Act, the validity of a will is disputed, unless, in the several cases aforesaid, the will affects only personal estate, the heir-at-law, devisees, and other persons having or pretending interest in the real estate affected by the will, shall, subject to the provisions of this Act and to the rules and orders under this Act, be cited to see proceedings; or otherwise summoned in like manner as the next-of-kin or others having or pretending interest in the personal estate affected by a will, should be cited or summoned, and may be permitted to become parties or intervene for their respective interests in such real estate, subject to the rules and orders and to the discretion of the Court." Section 62 then enacts, "that where probate of such will is granted after such proof in solemn form, or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall enure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, or the letters of administration with such will annexed, or a copy thereof, respectively stamped with the seal of the Court, shall, in all Courts and in all suits and proceedings affecting real estate of whatever tenure, be received as conclusive evidence of the validity and contents of such will, in like

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manner as a probate is received in evidence in matters relating to the personal estate; and where probate is refused or revoked on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this Act, such decree or order shall enure for the benefit of the heir-at-law or other persons against whose interest in real estate such will might operate, and such will shall not be received in evidence in any suit or proceeding in relation to real estate, save in any proceeding by way of appeal from such decrees or orders." Section 63 provides that in certain cases the heir need not be cited, and that where he has not been cited, he is not to be affected by the proceedings. Section 64 enacts that, "in any action at law or suit in equity, where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of, or affecting, the real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition to give to the opposite party ten days, at least, before the trial or other proceeding in which the said proof shall be intended to be adduced, notice that he intends at the said trial or other proceeding to give in evidence as proof of the devise or other testamentary disposition the probate of the said will or the letters of administration with the will annexed or a copy thereof, stamped with any seal of the Court of probate; and in every such case such probate or letters of administration, or copy thereof, respectively stamped as aforesaid, shall be sufficient evidence of such will and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition."

The Indian Succession Act (X of 1865) makes no distinction between real and personal property and the effect of probate of a will upon such property respectively. Section 242 enacts that "probate or letters of administration shall have effect over all the property and estate, moveable or immoveable, of

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the deceased, and shall be conclusive as to the representative title against all debtors of the deceased and all persons holding property which belongs to him, and shall afford full indemnity to all debtors paying their debts, and all persons delivering up such property to the person to whom such probate or letters of administration shall have been granted."

That probate of a will is conclusive as to the legal character of the executor was decided in *Allen v. Dundas* (1) and in *Noell v. Wells* (2), and has never since been doubted.

The section which I have just quoted affirms and enacts the conclusiveness of a grant of probate or administration as to the representative title merely, and it is a matter of observation that in this Act, passed in 1865, no provisions were introduced similar to those which I have just quoted from the Court of Probate Act of 1857, declaring a probate of will to be conclusive evidence in all Courts and in all proceedings of the validity and contents of the will itself. Are there any provisions in the Indian Succession Act which supply this omission or deficiency, whichever it may be called? Section 250 of the Act gives to the District Judge the large power of issuing citations to all persons claiming to have any interest in the estate of the deceased. What is the meaning of the expression "persons claiming to have any interest?" It appears to me that the persons claiming to have any interest "must be persons having such an interest as would entitle them to maintain a suit in respect of the subject-matter of such estate—persons having, for example, such an interest as, according to the practice of the Court of Chancery, would entitle them to file a bill in a Court of Equity; see this question discussed in Daniell's Chancery Practice, 5th Edition, page 267. If this be the proper construction, I think that the mortgagees, Brojo Mohun Ghose and Obhoy Churn Sen, and also the attaching creditor, Nobeen Chunder Sil, are persons who might have been properly cited under s. 250, and who, having come in and stated the interests claimed by them, are entitled to be made parties to the suit brought in the Court of the District Judge to obtain probate of the alleged will. Section 261 then enacts "that in any case be-

(1) 3 T. R., 125.

(2) 1 Lev., 235.

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fore the District Judge in which there is contention, the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provisions of the Code of Civil Procedure, in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who may have appeared to oppose the grant shall be the defendant."

It would appear that the persons who have appeared as caveators, and have been parties to the contentious proceedings in the Court of the District Judge (and perhaps also those persons who having been served with personal notice have failed to appear), will be the only parties bound by those proceedings; and that other persons falling within the definition "persons claiming to have any interest, &c.," who are not parties to the original proceedings, or, though entitled to be cited, were not served with personal notice thereof [see *illus. (b)* to s. 234], have for their only remedy an application under s. 234 for the revocation or annulment of the grant of probate or letters of administration; and that, in making such an application, they will be limited by the expression "just cause" as defined in that section.

Section 235 enacts that "the District Judge shall have jurisdiction in granting and revoking probate and letters of administration in all cases within his district." The jurisdiction created in the mofussil by the Indian Succession Act is a new jurisdiction which, before the passing of this Act, did not belong to the Civil Courts. According to the ordinary rules for the interpretation of Statutes, it follows that this jurisdiction can be exercised only by the Court of the District Judge, and not by any other Civil Court in the mofussil. I am, therefore, of opinion that, whether the persons interested came in the first instance to oppose the grant of probate, or subsequently to have a grant revoked or annulled, they must come to the Court of the District Judge; and as this Court has thus an exclusive jurisdiction, it must be careful not to deny all remedy to persons interested by refusing to allow them to be made parties to its proceedings. As to the text of what constitutes a sufficient interest to entitle any particular person to be made a party, according to the view which I have already stated, I think it comes to

1880 this, that any person has a sufficient interest who can show that
 IN THE he is entitled to maintain a suit in respect of the property over
 MATTER OF which the probate would have effect under the provisions of
 THE PETI- s. 242 of the Indian Succession Act.

SOONDURI I concur in allowing the appeal and remanding the case for
 DABEE, trial on the merits. The appellants will of course have to prove
 the interest alleged by them.

Appeal allowed.

Before Mr. Justice Mitter and Mr. Justice Maclean.

1880 BABOOJAN JHA (JUDGMENT-DEBTOR) v. BYJNATH DUTT JHA AND
 Nov. 27. OTHERS (DECREE-HOLDERS).*

Execution-Proceedings—Mesne Profits—Amount awarded in Execution larger than that claimed in Plaint—Court Fees Act (VII of 1870), s. 11, para. 2.

The plaintiff brought a suit for possession, and for a certain sum as mesne profits, which he assessed at three times the annual rent paid to the defendant by tenants in actual possession of the land. He obtained a decree for possession, and the decree ordered that the amount of mesne profits due to him should be determined in the execution-proceedings. On an investigation, a larger sum was found to be due to him for mesne profits than that claimed by him in his suit. The plaintiff, therefore, paid the excess fee as provided by para. 2 of s. 11 of Act VII of 1870; but *held*, the amount of mesne profits recoverable by him must be limited to the amount claimed in the plaint.

IN this matter the decree-holders had been plaintiffs in a suit to recover possession from the defendant (the judgment-debtor in this matter) of certain lands in Mouza Juggut, and also for mesne profits which it appeared they had in their plaint assessed at Rs. 309, or three times Rs. 103, the annual rent paid to the defendant by tenants in actual possession of the land. In this suit the plaintiffs, on the 24th July 1878, obtained a decree for possession, and it was also ordered by the decree that the amount of the mesne profits claimed was to be determined in the execution department. An Amin was accordingly deputed to make

* Appeal from order, No. 174 of 1880, against the order of H. W. Gordon, Esq., Judge of Tirhut, dated the 30th April 1880, affirming the order of Baboo Tej Chunder Mookerjee, Munsif of Madhoobani, dated the 13th September 1879.

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the necessary investigation, and he, after doing so, reported that the amount of mesne profits to which the plaintiffs were entitled for the three years, was a sum nearly three times as great as that mentioned in their plaint. In making this report, the Amin went on the principle that the plaintiffs having been in actual or khas possession of the lands claimed by them at the time when they were wrongfully dispossessed, were entitled to recover the full amount which they would have realized had they not been wrongfully dispossessed, and not what the judgment-debtor chose to receive according to his own arrangement while in wrongful possession.

The Munsif having overruled the objections of the judgment-debtor to this report, the latter appealed to the Officiating District Judge of Tirhut, and in this appeal, for the first time, raised, in addition to the objections previously urged by him, the further objection that the plaintiffs were bound by the claim as to mesne profits made by them in their plaint. The District Judge overruled all the objections of the judgment-debtor, and as to the one then first urged before him, ruled, that the appellant could not go behind the decree which had ordered that the amount of the mesne profits claimed was to be determined in the execution department without directing that the amount of mesne profits specified in the plaint should be the maximum amount recoverable in execution. In support of this view he referred to the following cases—*Hurro Gobind Bhukut v. Digumburee Debia* (1), *Lukheekant Doss v. Deendyal Doss* (2), and *Pearce Soonduree Dossee v. Eshan Chunder Bose* (3); also to s. 11, para. 2 of Act VII of 1870 (The Court Fees Act), which provides, that “where the amount of mesne profits is left to be ascertained in the course of the execution of the decree, if the profits so ascertained exceed the profits claimed, the decree shall be stayed until the difference between the fee actually paid and the fee which would have been payable had the suit comprised the whole of the profits so ascertained is paid.” It was clear, the Court remarked, from this section that the Legislature did not intend that the claimant should,

(1) 9 W. R., 217.

(2) 14 W. R., 82.

(3) 16 W. R., 302.

1880 in the matter of mesne profits, be limited to the amount claimed
 BABOOJAN JHA in his plaint, and as in the case before it, the excess fee had been
 v. paid by the decree-holders, it dismissed the appeal with costs.
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 DUTT JHA.

From this decision the judgment-debtor appealed to the High Court.

Baboo Anund Gopal Palit for the appellant.

Baboo Umakali Mookerjee for the respondents.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J.—In this case the appellant has been adjudged liable for about Rs. 1,200 as mesne profits due for three years on account of the respondents' share, three annas eight gundas one dumri, in Mouza Juggut, for which the respondents got a decree on 24th July 1878.

The only contention raised before us is, that the respondents are bound by the amount of mesne profits claimed by them in the plaint, viz., Rs. 309.

For the appellant two cases have been cited—*Karoo Lal Thakoor v. Forbes* (1) and *Gooroo Doss Roy v. Bungshee Dhur Sein* (2). In the former of these, it was laid down that "if the plaintiff had estimated his mesne profits in a general way with the view of determining the value of the suit, he would have been entitled to recover whatever sums had been realised or were capable of being realised by the defendant; but when he comes into Court, and knowingly fixes the rate of each bigha of land, he is bound by his own assessment." Loch, J., who was one of the Judges in this case, seems to have decided a subsequent case, that of *Hurro Gobind Bhukut v. Digumburee Debia* (3), in an opposite sense; but he joined in deciding the latter case, that of *Gooroo Doss Roy v. Bungshee Dhur Sein* (2), on the same principles as were laid down in *Karoo Lal Thakoor v. Forbes* (1). The respondent meets the contention by reference to two decisions of this Court—*Lukkeekant Doss v. Deendyal Dass* (4)

(1) 7 W. R., 140.

(3) 9 W. R., 217.

(2) 15 W. R., 61.

(4) 14 W. R., 82.

and *Pearee Soonchuree Dossee v. Eshan Chunder Bose* (1). In the former of these cases it was laid down, that "even with respect to the claim as stated in the plaint that would be subject to the result of further investigation;" and in the latter case, *D. N. Mitter, J.*, laid down that where the decree did not limit the amount, and the plaint stated the amount approximately, the Court executing the decree could not go behind it.

Section 11 of the Court Fees Act was also cited in support of the respondents' contention.

In their plaint the respondents deliberately claimed Rs. 103 as the annual rent of the land from which he had been dispossessed. There was no approximate rate or amount mentioned.

We think that the general rule that a plaintiff cannot recover more than he claims in his plaint, ought not to be departed from except under special circumstances. The decision in the case of *Gooroo Doss Roy v. Bungshee Dhur Sein* (2) lays this down, as we think, correctly. In this case the plaintiffs appear to have been aware that the lands of which they sought possession were in the occupation of tenants paying an ascertained rent of Rs. 103 for plaintiffs' share; that being so, the plaintiffs demanded damages at that rate on account of the loss they had sustained from the wrongful possession of the defendant. It would have been better if the first Court had not reserved the ascertainment of the mesne profits for execution, and our decision is, that the plaintiffs can recover no more than Rs. 309 for the years 1280—82.

The appeal will, therefore, be decreed with costs, which we assess at two gold-mohurs.

Appeal allowed.

(1) 16 W. R., 302.

(2) 15 W. R., 61.

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APPELLATE CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Field.

IN THE MATTER OF THE PETITION OF MOHAMED ESHAK.

1880
Nov. 29.

CHUNDRO MARWARI v. MOHAMED ESHAK.*

Appeal—Jurisdiction—Time from which an Order of Appointment dates.

An Assistant Magistrate convicted an accused on the 12th August, and by an order of even date, such Magistrate was invested with power to act as a Magistrate of the 1st class, although the fact, that he had been so invested with full powers, was not communicated to him until the 23rd idem. The accused appealed to the District Magistrate and was acquitted. On motion made to the High Court to set aside the acquittal, on the ground that, after the date of the order of the Lieutenant-Governor investing the Assistant Magistrate with further powers, no appeal lay to the District Magistrate,—*held*, that even supposing the Lieutenant-Governor's order conferred first class powers upon the Assistant Magistrate from the moment it was made, it must be shown before the District Magistrate's decision could be set aside, that the order of the Lieutenant-Governor was signed before the conviction.

Quere.—Whether an order investing a Magistrate with 1st class powers, is of any force, or amounts to an authority to exercise such powers, until the order has been officially communicated to the Magistrate?

IN this case the accused, Chundro Marwari, was charged with criminal breach of trust under s. 408 of the Penal Code; and the Assistant Magistrate found him guilty, and sentenced him, on the 12th of August 1880, to four months' rigorous imprisonment.

The accused appealed to the Magistrate, who held, that he had not acted in such a manner as to bring him under the criminal law, and released him from imprisonment.

The prosecutor then applied to the High Court to have the District Magistrate's judgment set aside, on the ground that on the very day (the 12th August 1880) on which the accused was convicted by the Assistant Magistrate, the latter was, by an order of the Lieutenant-Governor, made a first class Magistrate, and consequently that the District Magistrate had no jurisdiction to entertain an appeal from his decision. It appeared from a letter from the Magistrate of Burdwan to the Registrar of the

* Criminal Motion, No. 280 of 1880, against the order of C. C. Stevens, Esq., Officiating Magistrate of Burdwan, dated the 24th August 1880.

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High Court, that the Assistant Magistrate had been invested by Government with full powers to act as a Magistrate of the first class; but that the letter informing the Magistrate of Burdwan of the fact, was not received until the 21st of August, and was not communicated to the Assistant Magistrate until the 23rd. A rule was granted calling on the accused to show cause why the order made on appeal should not be set aside.

Mr. M. P. Gasper (with him *Baboo Amarendronath Chatterjee*) for the accused.

Mr. H. E. Mendies in support of the rule.

The opinion of the Court (GARTH, C. J., and FIELD, J.) was delivered by

GARTH, C. J.—In this case one Mohamed Eshak applied to this Court to send for the papers in a case in which one Chundro Marwari has been acquitted by the District Magistrate, for the purpose of having the Magistrate's judgment set aside.

Chundro Marwari was convicted on the 12th of August last by Mr. Caspersz, who was the Assistant Magistrate, of criminal breach of trust, upon the prosecution of Mohamed Eshak, who was his employer. An appeal was preferred to the District Magistrate, who, after hearing the case, reversed the conviction and acquitted the prisoner.

We were asked to set aside this judgment of the District Magistrate, upon the ground that, on the very day on which Chundro Marwari was convicted by Mr. Caspersz, Mr. Caspersz was, by an order of the Lieutenant-Governor, made a first class Magistrate, and consequently that the District Magistrate had no jurisdiction to entertain an appeal from his decision.

But having now ascertained the true state of the case, I think that there is nothing in this objection. In the first place I have great doubt, whether the mere order of the Lieutenant-Governor, that a Magistrate shall be vested with first class powers, is of any force, or amounts to an authority to the Magistrate to exercise those powers until the order of the Lieutenant-Governor has been officially communicated to him—until in fact he

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knows officially what the order of the Lieutenant-Governor is; and as the order, which was made on the 12th of August, could not have been received by Mr. Caspersz until after that day, there is no reason whatever why his decision of the 12th of August should not have been made the subject of appeal to the District Magistrate.

But even supposing that the order of the Lieutenant-Governor conferred upon the Magistrate first class powers from the moment when it was made, it does not appear that in this case the order, making Mr. Caspersz a first class Magistrate, was signed before the conviction. It may well be, that the conviction took place in the early part of the day, and that the order, making Mr. Caspersz a first class Magistrate, was made afterwards, and unless we are satisfied that the District Magistrate had no power to hear the case upon appeal, I think it clear that we ought not to interfere.

But then it is said that, as the case is now before us, we ought to set aside the judgment of the District Magistrate, if we find that it is erroneous in point of law. I confess, I entertain some doubt as to what our powers may be in that respect; but assuming that we had the power, I certainly should be unwilling, under the circumstances of this case, to set aside a judgment of acquittal. These cases of criminal breach of trust often involve very nice questions; and I think that the materials before the Magistrate may well have justified him in holding that, having regard to the confidential relation which existed between the prosecutor and the prisoner, the acts committed by the latter might make him answerable to his master civilly, but not criminally. That being so, I am of opinion, that we ought not to interfere, and that the rule must be discharged.

Rule discharged.

APPELLATE CIVIL.

Before Mr. Justice Morris and Mr. Justice Prinsep.

RAMKISHORE CHUCKERBUTTY AND ANOTHER (OBJECTORS) v.
KALLYKANTO CHUCKERBUTTY (DECREE-HOLDER).*

1880
Dec. 3.

Execution of Decree—Civil Procedure Code (Act X of 1877), s. 234—Representative of Deceased Husband's Estate—Form of Decree against Hindu Widow.

A Hindu widow instituted a suit to recover possession of certain property belonging to her deceased husband, and that suit was dismissed with costs. The widow having died before execution for the costs was taken out, the decree-holder sought to take out execution against the next heirs of the late widow's deceased husband. *Held*, that the fact, that the widow did not in her suit seek to recover any interest personal to herself, but that she contracted the judgment-debt in the effort to recover a portion of her husband's estate, to which in its entirety the next heirs of her late husband had succeeded, was sufficient to make the whole estate liable, and would entitle the decree-holder to satisfy his decree against "the legal representatives" of the late widow's husband, under s. 234 of Act X of 1877.

Mohima Chunder Roy Chowdhry v. Ram Kishore Acharjee Chowdhry (1) distinguished.

In a decree against a Hindu widow, it should be stated whether the decree is a personal decree, or one against her as representing her deceased husband.

ONE Bissessuree Debia, a Hindu widow, sued to recover a share in certain immoveable property, which she claimed as forming a portion of her husband's ancestral estate, from which she had been deprived, since her husband's death, by two of the defendants; the remaining two defendants were the next heirs of her husband, and were joined as parties to the suit as holding another share in the property in question.

The suit was dismissed with costs in favor of the first two defendants, who alone appeared. The decree-holder attached certain property in the hands of the widow, but whilst execution was being taken out, the widow died, and the decree-holder took out

* Appeal from order No. 230 of 1880, against the order of T. M. Kirkwood, Esq., Judge of Mymensing, dated the 1st May 1880, reversing the order of Baboo Kanie Lall Mookerjee, Munsif of Nicklee, dated the 14th July 1879.

(1) 15 B. L. R., 142.

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execution against the next heirs of her husband. The decree-holder admitted that the widow left no property of her own, and that the property sought to be attached was held by her in her capacity as a Hindu widow. In examination it appeared that one of the objectors, who was one of the reversionary heirs, stated, that he had advised the widow to bring the suit, and had looked after it for her. The Munsif held, that the widow's life-interest having come to an end, nothing remained to be sold at auction, and he therefore dismissed the application.

The decree-holder appealed to the District Judge, who held that the debt under the decree was not a personal debt of the widow, but was one binding on the estate of her husband. He therefore allowed the appeal.

The objectors appealed to the High Court.

Baboo *Jogesh Chunder Roy* for the appellants.

Baboo *Bama Churn Banerjee* for the respondent.

The judgment of the Court (MORRIS and PRINSEP, JJ.) was delivered by

MORRIS, J. (who, after stating the facts, continued):—In special appeal it is contended that the Judge has put a wrong construction upon the decree, which by its terms purports to be against Bissessuree Debia personally, and that they, special appellants, are not, within the meaning of s. 234 of the Civil Procedure Code, "legal representatives of the deceased." In support of this contention they cite as an authority the case of *Mohima Chunder Roy Chowdhry v. Ram Kishore Acharjee Chowdhry* (1). They also refer to a recent, but unreported, case, decided in special appeal by a Division Bench of this Court. The judgment of Sir Richard Couch in the first quoted case supplies two reasons, which militate against the argument of the special appellants. Sir Richard Couch says:—"In the present case the debt was not due from the husband, and if the estate of the husband is to be charged either for the arrears of rent becoming due after his death, or for the bond which was given by the

widow, it can only be upon the ground that the debts were necessarily contracted by the widow, or under such circumstances as to make the whole estate liable, and not merely the interest in it of the person who contracted them." And again: "Here the suits were against the widow only, she cannot be said to have been defending them as representing the reversioner, or as protecting his interest."

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~~CHUCKEE~~
~~BUTTY.~~

Now it is manifest in this case, from the summary of the plaint which is embodied in the decree now sought to be executed, that the widow did not seek by her suit to recover any interest personal to herself, but that she contracted this judgment-debt in the effort to recover a portion of her husband's estate. It was only in her character as representative of that estate that she did, or indeed could have, instituted that suit, and any land which she might recover in it would necessarily form portion of her husband's ancestral estate which she enjoyed during her lifetime, and to which, at her death, the special appellants, as next heirs, have succeeded. But if we had any doubt regarding the nature of that decree, it would be removed by the conduct of the reversionary heirs, the special appellants before us. They were made parties to the suit, but made no opposition to the claim of the widow. On the contrary, the Judge points out that one of them admitted that he advised the widow in the conduct of the suit. There, it seems to us, are, to use the words of Sir Richard Couch, "circumstances which make the whole estate liable," and which render this case clearly distinguishable from the one which was then before him.

As to the unreported case referred to, the facts of it are not before us, and it seems to us from the judgment which has been read to us, that the learned Judges never intended to decide that, under no circumstances, could the estate in which a widow has only a life-interest be rendered liable in satisfaction of a decree obtained against her, unless such liability was expressly declared in the decree.

It would no doubt be more satisfactory if our Courts were always to be careful in recording whether a decree against a Hindu widow is a personal decree or one against her as representing her husband's estate and chargeable thereon,—and such

1880 a practice would materially diminish litigation; but in our
 RAMKISHORE CHUCKER-BUTTY v. KALLYKANTO CHUCKER-BUTTY.
 experience this has not been hitherto the practice of our Courts.
 Having regard, therefore, to these considerations, we are of
 opinion that the decree was against the widow Bissessuree as
 representing her husband's estate; and that, therefore, the special
 appellants, as succeeding to that estate by right of inheritance,
 are liable to satisfy that decree as the legal representatives within
 the meaning of s. 234.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Field.

1880
 Dec. 3.

IN RE MIR EKKAR ALI.
 THE EMPRESS v. MIR EKKAR ALI.*

Penal Code (Act XLV of 1860), ss. 192, 464, cl. 2—Fabricating False Evidence—Forgery—Alteration of Date of Document.

Where the date of a document, which would otherwise not have been presented for registration within time, is altered for the purpose of getting it registered, the offence committed is not forgery, where there is nothing to show that it was done "dishonestly or fraudulently," within cl. 2, s. 464 of the Penal Code, but fabricating false evidence within s. 192.

THE facts sufficiently appear in the judgment of the Court (GARTH, C. J., and FIELD, J.), which was delivered by

GARTH, C. J.—The accused presented a bond for registration on the 18th December 1879. This bond is said to have been originally dated the 6th August 1879. If this date had remained, the instrument was presented after the time within which such an instrument must be by law presented for registration. The accused is said to have altered the date to the 26th August in order to bring the bond within time; or to have presented it for registration, knowing that the date had been so altered. It appears to us that the alteration of

* Criminal Revision, No. 289 of 1880, called for by the High Court on Sessions Statement of Bhagalpore.

the date under these circumstances is not forgery, as there is nothing to show that it was done "dishonestly or fraudulently" within the meaning of cl. 2, s. 464 of the Penal Code.

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IN RE MITT
ERRAR ALL.

It is not contended that the bond itself was not genuine, or that the accused intended to support a false claim by a false bond. It is clear that his intention in altering the date of the bond was to cause the registering officer to entertain an erroneous opinion touching a point material to the result of the registration proceedings; and this being so, his acts constituted fabricating false evidence (ss. 192, 193, Penal Code), and using fabricated evidence (s. 196, Penal Code).

In this view of the law, and as the Sessions Judge did not take a serious view of the offence committed, we reduce the sentence of imprisonment to two months' rigorous imprisonment. The sentence of fine will stand.

Sentence modified.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Pontifex, and Mr. Justice Morris.

IN THE GOODS OF GRISH CHUNDER MITTER, DECEASED.

1880

Dec. 4.

Letters of Administration—Estate of Deceased Hindu, consisting of Immoveable and Moveable Property.

Except under special circumstances, letters of administration to the estate of a deceased Hindu must be taken out in respect of the immoveable as well as the moveable property forming part of such estate.

THIS was a reference to the Chief Justice under s. 5 of the Court Fees Act (VII of 1870), under the following circumstances:—An application was made on the Original Side of the High Court, before Broughton, J., for the grant of letters of administration to the estate of one Grish Chunder Mitter, deceased, limited to certain Government securities. In addition to these securities, the deceased had left landed property, but the applicant expressly omitted any request for letters of administration in respect of such property. In the opinion of the learned Judge, the question whether letters of administration for such limited purpose could be granted in respect of the estate of a Hindu

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deceased, was a fit one for reference, under s. 5 of the Court Fees Act (VII of 1870), to the Chief Justice.

This question was accordingly referred to the Chief Justice by the Taxing Officer. In the letter of reference the attention of the Chief Justice was directed to the following cases: *Mancharji Pestanji v. Narayan Lakshumanji* (1); *In the goods of Ram Chandra Dass* (2), as also to a note on the subject by Mr. Collis, the then Officiating Administrator-General, in which note the following cases were also quoted:—*Kadumbinee Dossee v. Koylash Kaminee Dossee* (3), *Jebb v. Lefevre* (4), *Freeman v. Fairlie* (5), *Naoroji Beramji v. Rogers* (6), *Doe dem Savage v. Bancharam Tagore* (7), *In the goods of Bibee Muttra* (8), *Mohar Ranee Essadulh Bye v. East India Company* (9), *Lallubhai Bapubhai v. Mankuvarbai* (10), *Srimati Jaykali Debi v. Shishnath Chatterjee* (11), *Nilkant Chatterjee v. Peari Mohan Das* (12), *Gopal Nyrain Mozoomdar v. Shosheebhushun Mozoomdar* (13), *Lal Chand Ramdayal v. Guntibai* (14), *Brajanath Dey v. Anandamayji Dasi* (15), and *Mussanrut Bhobunmoyi Debia v. Ram Kishore Acharji* (16).

The point being a very important one, the Chief Justice requested Pontifex and Morris, JJ., to hear the case with him.

The *Advocate-General* (Mr. Paul) for the Secretary of State.

Mr. *Piffard* for the petitioner.

The opinion of the Court was delivered by

GARTH, C. J.—We think it quite clear that, in this case, and as a rule in all cases, general letters of administration of a Hindu's estate must be taken out for the immoveable as well as the moveable property, and that duty must be paid upon the value of the

(1) 1 Bom. H. C. Rep. 77 at p. 83.

(2) 9 B. L. R., 80.

(3) I. L. R., 2 Calc., 431.

(4) *Montrieu's Morton*, 152.

(5) 1 Moore's I. A., 305.

(6) 4 Bom. H. C. Rep., O. C., 1, at pp. 68, 71.

(7) *Montrieu's Morton*, 105.

(8) *Id.*, 191.

(9) 1 Tay. and B., 290.

(10) I. L. R., 2 Bom., 388.

(11) 2 B. L. R., O. C., 1.

(12) 3 B. L. R., O. C., 7.

(13) 13 B. L. R., 21.

(14) 8 Bom. H. C. Rep., O. C., 140.

(15) 8 B. L. R., 208, at p. 220.

(16) 10 Moore's I. A., 279, at p. 308.

whole. Limited administration can only be granted under special circumstances.

The real point in the case decided by Kennedy, J., in the case of *Kadumbinee Dossee v. Koylash Kaminee Dossee* (1), is beside the present question; and the opinion there expressed by the learned Judge seems not to have been necessary for the purposes of his decision.

Attorney for the Secretary of State: *The Government Solicitor* (Mr. Upton).

Attorney for the petitioner: Baboo *Shamoldhone Dutt*.

Before Mr. Justice White.

KRISTO MOHINEY DOSSEE AND OTHERS v. KALLY PROSONNO
GHIOSE AND ANOTHER.*

1880
Dec 7.

Execution—Relief asked for in accordance with Statements in Plaintiff not forming a Separate Prayer in the Plaintiff—General Prayer for Relief—Control of Execution.

A, a joint owner of an estate with *B*, saved the joint estate from sale for arrears of Government revenue in payment of which *B* had made default, for such purpose mortgaging her share in the estate to *E*. *A* then sued *B* for contribution. Pending that suit, *B* again made default, and the estate was sold and purchased by *C*, subject to incumbrances. Subsequently, *A* obtained her decree against *B*, and assigned her decree to *D*, who obtained an order for execution and attached certain property belonging to *B*. *D* and *E* then entered into an agreement with *C*, that they would release *C* and the share charged with payment of *A*'s decree, from all liability, and that they would entrust the whole conduct of the execution-proceedings to *C*, in consideration of his granting a perpetual lease of part of the property to *D* and *E*. In pursuance of this agreement, *D* and *E* granted a release to *C*, and *C* granted a lease to *E* for himself, and it was contended, also, as benamidar of *D*. The agreement contained a proviso that should the Court, in which the decree should be executed, of its own accord or on the petition of *B*, or his legal representative, notwithstanding objection on the part of *D* and *E*, make any order directing the decree to be executed against the estate, then in such case *D* and *E* should not be bound by the release; and that it should be open to *C* to cancel the agreement. *D* applied for execution against the estate of the adopted son of *B* (who had died), but subsequently abandoned all proceedings and transferred his decree to the High Court to obtain execution against a house belonging to *C*, in Calcutta. The adopted son and widow of *B*,

* Application in suit No. 632 of 1880, Original Side.

(1) I. L. R., 2 Calc., 430.

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in a suit brought against *C* and *D*, objected to the execution-proceedings, and after paying the sum due to *D* into Court, asked for an injunction staying all further proceedings in execution until the hearing of the suit.

Held, that *D* had obtained, out of the lien directed by the decree, some benefit or advantage, which the plaintiffs might have a right to have valued at the hearing, and that, notwithstanding this did not form the subject of a separate prayer in the plaint, the Court would grant the injunction.

THE facts of this case, which gave rise to the motion made before the Court, were, that two persons, Khelut Chunder Ghose and Kaminee Soondery Dossee, were the joint owners of a certain estate, registered No. 1 in the Towjee of the Nuddea Collectorate; that the Government revenue, through default on the part of Khelut Chunder, fell into arrears, and Kaminee, in order to prevent a sale of the estate, borrowed a sum of money at high interest, mortgaging her share of the estate to one Hurry Churn Bose, and paid off the sum due as revenue; she, on the 5th June 1872, sued Khelut Chunder, for contribution of his share of the revenue so paid by her as aforesaid, asking that the property for which revenue had been paid might be made a first charge for the debt. Pending this suit, Khelut Chunder again defaulted, and Kaminee being unable to raise sufficient money to save the estate, it was sold by public auction, and purchased, on the 23rd March 1874, by one Kaliprosonno Ghose, subject to the incumbrances thereon; and he, on 9th April 1874, took an assignment of the mortgage from Hurry Churn Bose. On the 11th January 1873, Kaminee's suit against Khelut Chunder was dismissed, but was eventually, on the 18th January 1876, finally decided in her favor in the Court of appeal. On the 16th January 1877, Kaminee assigned her decree to one Rutnessur Biswas, who, on the 13th July 1877, after placing his name on the record in the stead of Kaminee, applied for and obtained an order for execution of Kaminee's decree, and attached certain properties belonging to Khelut Chunder. Some time in the month of July 1877, Rutnessur and Hurry Churn Bose entered into an agreement with Kaliprosonno Ghose, "that they should not proceed to realize the charge against the zemindari which formerly belonged to Khelut and Kaminee, and that they would release Kaliprosonno and the share so charged with the payment of the decree, from all liability, and

that they would not take any proceedings in any Court against Kaliprosunno and the share charged under the decree, and that they would entrust the whole conduct of the execution-proceedings to Kaliprosunno in consideration of the latter granting a perpetual lease of part of the said property to Rutnessur and Hurry Churn Bose at a low rental." There was, however, a proviso in this agreement to the effect, that should the Court, in which the decree should be executed, of its own accord, or upon petition of Khelut Chunder, or his legal representatives, and notwithstanding objections on the part of Rutnessur and Hurry Churn Bose, make any order directing the decree to be executed in the first instance against the estate formerly belonging to Khelut and Kaminee, then Rutnessur and Hurry Churn Bose should not be bound by the covenant for release, nor be bound to indemnify Kaliprosunno as therein agreed; but that in such case it should be open to Kaliprosunno to cancel the agreement. In pursuance of the agreement, on the 4th August 1877, Rutnessur and Hurry Churn Bose executed a release in favor of Kaliprosunno; and on even date with such release, Kaliprosunno executed a patni lease in favor of Hurry Churn Bose.

On the 1st August 1877, Rutnessur took certain steps to execute his decree, which, however, were subsequently abandoned. But, after the death of Khelut Chunder, Rutnessur, on the 13th June 1878, applied for execution against certain property of Romanath Ghose, the adopted son of Khelut Chunder, but an objection was successfully taken that execution should first be taken out against the property which formerly belonged jointly to Khelut and Kaminee, and an order passed in accordance with such objection; this order was, however, reversed by the High Court, and Rutnessur, however, subsequently, abandoned all previous execution-proceedings, and transferred his decree to the High Court for execution against certain properties of Kaliprosunno in Calcutta.

The plaintiffs in this suit, the widow of Khelut Chunder, and the next friend of Khelut Chunder's adopted son, Romanath Ghose, objected to execution being taken out, and after paying the sum due to Rutnessur under the decree into Court, asked for an injunction to stay all further execution-proceedings.

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On the 15th September 1880, a rule *nisi* was obtained, calling upon Rutnessur to show cause why all further execution-proceedings should not be stayed.

Mr. Branson (with him Mr. Mittra), for the defendant Rutnessur Biswas, showed cause against the rule.—The rule has been obtained on the facts set out in the plaint alone, no verified petition or affidavit has been filed by the plaintiffs. The Court will not make absolute the rule, seeing that it has been obtained in such an irregular manner. [WHITE, J.—I find that the practice in the offices of the Original Side of the Court is to allow in taxation the costs of affidavits in such motions as the present, but inasmuch as such an affidavit would be but an echo of the plaint, I do not think I can refuse to hear the rule because there happens to be no petition or affidavit.] Plaints are verified on *information and belief*, and no Court would grant an injunction on an affidavit made merely on *information and belief*. [WHITE, J.—The Court having granted the rule on the plaint, I shall allow the rule to be heard.] The only point raised by the other side as against our right to take out execution is, that we entered into an agreement with Kaliprosunno, which has partially satisfied the decree. Now there has been no part satisfaction, the plaintiff makes no such allegation in his plaint, and no patni has been granted to my client. [Mr. Kennedy.—The prayer for general relief is large enough to include the allegation.] The question as to whether there has been partial satisfaction, ought to have been raised in the execution-proceedings, and not in a separate suit: s. 244 of Act X of 1877. Where an injunction is applied for on one ground, it will not be granted on another which has not been put forward: Joyce on Injunctions, p. 1030.

Mr. Kennelly (with him Mr. Evans, Mr. Bonnerjee, and Mr. Henderson) in support of the rule.—We have paid the money due under the decree into Court, and the defendants should only be allowed to take it out on giving security; we say that Kaliprosunno ought to pay the money, and not Khelut Chunder's estate. Rutnessur and Hurry Churn agreed to release the charge on Kaliprosunno and also the charge on the

estate; the patni potta was executed in pursuance of the agreement, and we say that Hurry Churn executed it as for himself and benami for Rutnessur; we, therefore, seek to have the equities between Khelut and Kaliprosunno determined. Rutnessur has not been compelled to go against Allumpore, the estate formerly belonging to Khelut and Kaminee; therefore the saving clause of the agreement is not put in force.

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WHITE, J.—I have come to the conclusion, after some doubt, to make this rule absolute.

The object of the suit is to compel Kaliprosunno Ghose to pay, to the extent of the value of his share in a particular zemindari, the amount of a decree which has been passed against this estate.

It is unnecessary to consider the doubts as to whether the plaintiffs will be entitled at the hearing to that relief or any other relief in some qualified form, because, assuming that they could establish their right to any such relief, I consider that the plaintiffs have failed to show that the defendant Rutnessur Biswas, who is now executing the decree, ought to be stayed in consequence, supposing even that such an equity at all exists. The Appellate Court having decided that Rutnessur may execute his decree against the estate of Khelut, and not against the estate upon which a lien was declared by the decree, he cannot, in my opinion, be restrained from executing his decree, because he is exercising his own right, but when he does exercise that right, the plaintiffs can ask Kaliprosunno to recoup. The prayer of the plaint is not one upon which they can take this point, but I am not prepared to say that the plaintiffs may not at the hearing get the benefit under the prayer for general relief against the defendant Kaliprosunno Ghose.

It is objected that, having regard to the rules which govern this Court in granting injunctions, the rule should be discharged, because the Court is of opinion that the injunction could only be sustained where there is a specific prayer—*Castelli v. Cook* (1). I am not prepared to give full effect to the rule asked for, but there are statements in the 18th and the follow-

(1) 7 Hare, 89.

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ing paras. of the plaint, which show that certain transactions have taken place between Kaliprosonno and Rutnessur, the result of which appear to me to be, that Rutnessur has, out of the lien directed by the decree, derived some benefit or advantage, which benefit or advantage the plaintiffs ought to have valued, and such value set against the amount which they are bound to pay Rutnessur under the decree. This, however, does not form the subject of a separate prayer in the plaint.

It appears to me that there is a case made out that the defendant Rutnessur's execution should be controlled. I think this Court ought to control it and make the circumstance alluded to by Mr. Branson a consideration in dealing with the costs.

It is also objected, that as it appears that Rutnessur has been only executing the decree, the question raised by the plaintiffs as to partial discharge of the decree should be dealt with under s. 204 of the Civil Procedure Code. This is no doubt an argument to be adduced at the hearing, and I cannot at this stage of the case be called upon to decide that, nor could I dismiss the suit at this stage while this point is not decided. The money has been paid into Court by the plaintiffs, and that was one of the terms upon which this rule was obtained.

Now the question is, whether the execution-creditor is to be put upon some terms if he takes out the money before the final determination of the case.

Upon the fact appearing in the plaint that Rutnessur obtained a benefit which the plaintiffs ought to have in reduction of what is payable under the decree, *viz.*, the value of an eight anna share in patni lease in five villages without salamee, it may be that they are only entitled to whatever the amount of money was in the payment of which Khelut Chunder made default, and for which his estate was sold; but all this should be decided at the hearing. At all events, some benefit has been obtained which ought to go in reduction of the amount decreed.

Mr. Branson's client ought to have his costs.

The plaintiffs having paid into Court the amount of the decree and costs, *plus* Rs. 500 for costs of execution, this rule should be made absolute, and Rutnessur be restrained from prosecuting his execution-proceedings until the hearing of the

suit or further order of this Court. Rutnessur to be at liberty to take the amount out of Court on furnishing security to the satisfaction of the Registrar. He will have his costs of showing cause against the rule.

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Rule absolute.

Attorney for the plaintiffs: *J. Remfry.*

Attorney for the defendant Rutnessur: Baboo *Troyluckonauth Roy.*

APPELLATE CRIMINAL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Field.

IN THE MATTER OF THE PETITION OF THE LEGAL REMEMBRANCER.

1880
Dec. 7.

THE EMPRESS v. NOBO GOPAL BOSE.*

Transfer of Criminal Case to another District—Criminal Procedure Code (X of 1872), s. 64—Grounds necessary to obtain Transfer when application is opposed by Accused.

Before the transfer of a case from one Criminal Court to another can be made, in cases in which the accused objects to the transfer, the prosecution must bring forward the very best evidence to prove that a fair trial cannot be had in the district in which the case is ordinarily triable.

THIS was an application for the transfer of a criminal case under s. 64 of Act X of 1872.

On the 19th November 1880, the Crown obtained a rule calling upon the accused to show cause why the case should not be transferred from the Court of Burdwan to Hooghly, or to such other district as the Court might direct.

The grounds on which the rule *nisi* was obtained were set out in an affidavit of Mr. Stevens, the District Magistrate of Burdwan, and were to the effect that he had been informed, and believed, that the case was causing considerable excitement in the district; that the prosecutor and one of the accused were persons of influence in the locality; and that most of the inhabitants of the district had their sympathies enlisted on one side or the other.

The rule came on for hearing on the 7th December 1880.

* Criminal Rule, No. 31 of 1880, against the order of C. C. Stevens, Esq., District Magistrate of Burdwan, dated the 30th November 1880.

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Mr. *M. P. Gasper* appeared to show cause against the rule. The grounds set out in the affidavit of Mr. Stevens (who has only lately been appointed the Magistrate of Burdwan) are insufficient; his statements are all based on information and belief; and in no one instance, is the name of any informant given. My client, in his affidavit, states that he has little or no influence in Burdwan; that he had, under an order of Court, summoned thirty-two witnesses, and had been compelled to deposit 300 rupees in Court for the expenses of their attendance, and that the greater portion of such witnesses lived in Burdwan itself, and that if the case is transferred, he would be put to great expense; that out of the 290 jurors on the jury list of Burdwan, he is only intimately acquainted with at most fourteen, and entirely unacquainted with 180 others. There is further no precedent in any of the reports which admits of a transfer on the grounds put forward by the Crown. They have numerous safeguards against the grounds they rely on.

Baboo Jugodanund Mookerjee in support of the rule.

The judgments of the Court (GARTH, C. J., and FIELD, J.) were as follows:—

GARTH, C. J.—I think that this rule should be discharged.

It was granted at the instance of the Legal Remembrancer calling upon Nobo Gopal Bose and the other prisoners to show cause why the case against them, which now stands for trial in the Sessions Court of Burdwan, should not be transferred to Hooghly or to the 24-Parganas, or to some other jury district, upon the ground that a fair trial is not likely to be obtained at Burdwan.

The affidavit in support of this rule was made by Mr. Stevens, the District Magistrate of Burdwan, and it is certainly couched in very general terms.

Mr. Stevens says, that he has been credibly informed, and believes, that the case is causing considerable excitement in the district; that the prosecutor, and the prisoner Nobo Gopal Bose, are persons of influence in the locality; and that most of the inhabitants of the town of Burdwan and its neighbourhood

have their sympathies enlisted on one side or the other. But he does not tell us from what sources his information is derived, nor, except in very general terms, the grounds of his belief.

But we were nevertheless induced to grant the rule, because having regard to the allegations in the affidavit, we thought it extremely probable that both sides might wish to have the case tried elsewhere, and that it would be at least as desirable for the prisoners as for the Crown that the trial should not take place at Burdwan.

It now appears, however, that all the prisoners, and especially Nobo Gopal Bose, object very strongly to the transfer, both upon the ground of expense and otherwise; and it therefore becomes our duty to determine whether, under the circumstances disclosed in the affidavits on either side, we are justified in removing the case from the Court where it is legally triable.

I am clearly of opinion that before we transfer a criminal case to another district against the wish of the accused party, we ought to require the very best evidence that a fair trial cannot be had, or in other words, that the jury cannot be trusted to do their duty impartially.

Now, as I said before, Mr. Stevens's affidavit is very general in its language. It seems that he himself has only been in the district about three months. He does not tell us what are his sources of information or the grounds of his belief, and it may be, as Mr. Gasper has suggested, that he has acted upon the report of the Police, who may be desirous of having the case tried in another district.

On the other hand, we have an affidavit from the prisoner Nobo Gopal Bose, in which he says, in the first place, that he has made arrangements for the trial at Burdwan, and incurred considerable expense in so doing; and in the next place he says, that there are upwards of 290 jurymen in the district of Burdwan, that with at least 180 of those persons he is not acquainted, and that to the best of his belief he does not know any one who is acquainted with them; and lastly, he directly contradicts the statements of Mr. Stevens as to the case having caused any public excitement.

Then we must also bear in mind, in dealing with applications

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of this kind to transfer a case from one district to another, that there are many safeguards in this country against any undue bias on the part of the jury.

In the first place, there is the right to challenge any of the jurymen who are known to be partizans of either party, if there is any real ground for supposing that they are likely to be unduly biased. Then another safeguard, as Mr. Gasper very properly observes, is, that the Judge may, if he pleases, disregard the verdict of the jury altogether, and there is also the High Court as a last resource in case of any miscarriage of justice. So that there is less reason here than there might be in England for transferring a case for trial to another district, upon the ground that an impartial jury is not likely to be obtained.

If, therefore, the Crown considers it desirable that the trial should take place elsewhere, the application should have been made upon much more cogent grounds and better materials than those which we have now before us, and we cannot accede to the suggestion of the learned Government Pleader, that we should postpone our decision upon their rule, in order that some fresh materials may be obtained.

I should also add, that if I had more doubt about the matter than I have, I confess that what we have just now heard from my learned brother, and from the Government Pleader, would have influenced my mind very materially. We are informed by the latter (although he has had a large experience in this Court for many years) that he is unable at present to mention a single instance in which such a transfer in a criminal case has been made. And my learned brother, who, we all know, has had a very large experience in the mofussil both as a District Judge and a Magistrate, does not remember any case of such a transfer, although in many instances criminal trials have been held under circumstances which have caused considerable public excitement.

The rule must, therefore, be discharged.

FIELD, J.—I concur in thinking that this rule should be discharged.

This is an application, under s. 64 of the Code of Criminal Procedure, to have a criminal trial before the Court of Sessions transferred from the Burdwan District to the district of Hooghly, Howrah, or the 24-Parganas.

The grounds upon which such a transfer can be made under s. 64 are—(1) that it will promote the ends of justice, or (2) that it will tend to the general convenience of the parties or their witnesses.

Now the second ground may be disposed of at once, for in the present case it is not attempted to be shown that the transfer of the trial from Burdwan will tend to the convenience of the parties or witnesses, while on the part of the accused, it is strongly urged that the transfer, if allowed, will cause considerable inconvenience and expense to him in procuring the attendance of the witnesses whom he wishes to call for the defence. Then as to the first ground it appears to me that, in order to obtain such a transfer, there should be shown to this Court something more tangible and something more definite than is disclosed in the affidavit made by Mr. Stevens. It may be that this gentleman entirely believed what he has stated in his affidavit, and I have no doubt that he did believe it. But what he has stated is stated not upon his own personal knowledge, but upon his belief and upon information received from third parties, who are not mentioned, and as to whose means of knowledge or good faith we have no means of forming an opinion.

I think that this affidavit, unsupported by other matter, even under the system of criminal law in force in England, would be considered insufficient; and I think that in this country it is *ex majore vi* insufficient, and for this reason. The system of criminal law in force in India differs in three essential respects from that in force in England. In the first place, the jury must not necessarily be agreed in the verdict. The verdict of a majority is sufficient. In the second place, the accused must not necessarily be acquitted, if the jury or the majority of them find him not guilty. The Sessions Judge can, if he differs in opinion from the jury, refer the case for the consideration of the High Court, and it has been decided that upon such a reference the High Court can consider the case as well upon the facts as

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upon the law. In the third place, the Local Government, if dissatisfied with the verdict of acquittal, can appeal against it to the High Court.

Having regard to these essential points of difference between the law in India and the law in England, it appears to me that, in order to succeed in an application of this nature when opposed by the person committed for trial, at least as strong a case should be made out in this country as in England, and speaking for myself, I should say a stronger case.

It may be observed that in the affidavit upon which this rule was granted, it was stated that Giridhari Mohunt, upon whose prosecution the accused have been committed, has a strong party in Burdwan opposed to Nobo Gopal, accused, while Nobo Gopal has influence with persons opposed to Giridhari. It therefore appeared quite possible that Nobo Gopal would himself wish to be tried in another district; but as he desires to be tried at Burdwan, and is willing to risk the influence of Giridhari being exerted against him, an order for the transfer of the trial can be made only if we are satisfied that Nobo Gopal may, or may be able to, exert his influence with the jury so as to defeat the ends of justice, and of this I am not satisfied on the affidavit, which is the only evidence before us. I concur in discharging the rule.

Rule discharged.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Field.

1880

Dec. 9.

THE GOVERNMENT v. KARIMDAD.*

Penal Code (Act XLV of 1860), s. 211—Prosecution for making a False Charge—Opportunity to Accused to prove the Truth of Charge.

Before a person can be put upon his trial for making a false charge under s. 211 of the Penal Code, he must be allowed an opportunity of proving the truth of the complaint made by him; and such an opportunity should be afforded to him, if he desires to take advantage of it, *not before the Police, but before the Magistrate.*

* Criminal Reference, No. 196 of 1880, from the order of A. Manson, Esq., Officiating Magistrate of Chittagong, dated the 20th November 1880.

Magistrates should clearly understand that whilst the Police perform their proper duty in collecting evidence, it is the function of the Magistrate alone to decide upon the sufficiency or credibility of such evidence when collected.

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On the 26th July 1880, one Karimdad laid a complaint before the head constable in charge of Kubdia outpost, against one Doorga Churn Ghose, a Government officer, and against his peon, under s. 342 of the Penal Code. The Police enquired into the case and reported that the charge was false.

On the 20th August, the Deputy Magistrate in charge of the subdivision recorded his order on the Police report to the effect, that the charge laid was utterly false, and recommended the Magistrate of the District to order the prosecution of Karimdad under s. 211 of the Penal Code. The Magistrate had previously summoned Karimdad to make his statement at headquarters before one of the Deputy Magistrates; he, however, neglected to attend.

On the 31st August, the Magistrate sanctioned the institution of proceedings against Karimdad under ss. 211 and 198 of the Penal Code, and directed the Deputy Magistrate to take up the case.

On the 21st September, the Deputy Magistrate, without going into the case, passed the following order:—"As without first hearing the case in which Karimdad is the complainant, a case under s. 211 of the Indian Penal Code cannot proceed, it is therefore ordered that the Police be directed to send up witnesses and Golok Sing, peon, as accused in the case in which Karimdad is the complainant, and the case be fixed for the 30th September. The witnesses present to appear on that day."

On the 30th September, Golok Sing was not present, and the Deputy Magistrate addressed the District Magistrate on the subject, and postponed the case until a reply was received.

The District Magistrate, considering that the course pursued by the Deputy Magistrate was wrong, transmitted the record, under s. 296 of Act X of 1872, to the High Court.

No one appeared before the High Court.

1880 The opinion of the Court (GARTH, C. J., and FIELD, J.) was
GOVERNMENT as follows :—

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KARIMDAD. We are unable to see that the orders passed by the Deputy Magistrate in this case are irregular or illegal. Whatever opinion may have been formed by the Magistrate upon the Police report as to the truth of Karimdad's complaint, when he appeared with his witnesses and asked to be allowed to prove his case, we think that the Magistrate could not, without hearing him and his witnesses, and deciding upon the truth or falsehood of his charge, proceed to put him on his trial under s. 211 of the Penal Code. It is manifest justice that a man ought not to be tried for making a false complaint until he has had an opportunity of proving the truth of the complaint made by him; and such opportunity should be afforded him, if he desire to take advantage of it, not before the Police, but before the Magistrate. If persons are to be prosecuted under s. 211 of the Penal Code upon the mere report of a Police officer that their complaints are not true, the Police are made the judges whether a complaint is true or false. Such a delegation of magisterial functions is not contemplated by the law, and it requires but little experience of this country to understand how dangerous it would be to the best interests of justice. Magistrates of all grades cannot understand too clearly that, while the Police perform their proper duty in collecting evidence, it is the function of the Magistrate alone to decide upon the sufficiency or credibility of this evidence when collected.

We decline to interfere (1).

(1) See *Empress v. Irad Ally*, I. L. R., 5 Calc., 4 Calc., 869; *Empress v. Salih*, 184; and *Ashruf Ali v. The Empress*, I. L. R., 1 All., 527; *Empress v. Abul* I. L. R., 5 Calc., 181.
Husain, I. L. R., 1 All., 497; *Bhokte*—

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Field.

IN THE MATTER OF THE PETITION OF HAMEEDOOLLAH.

HAMEEDOOLLAH (PLAINTIFF) v. MAHOMED ASGHUR HOSSEIN
AND ANOTHER (DEFENDANTS).*

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Dec. 9.

Copyright Act (XX of 1847), s. 7—Small Cause Court Acts (IX of 1850 and XI of 1865)—Zilla Court—Act XII of 1876.

As the class of cases provided for by s. 7 of the Copyright Act (XX of 1847) was transferred to the jurisdiction of the Calcutta Court of Small Causes by Act IX of 1850, notwithstanding the express language used in s. 7 of the Copyright Act, so by analogy the jurisdiction in the same class of cases arising in the Mofussil was transferred to the jurisdiction of the Mofussil Courts of Small Causes by Act XLII of 1860 and Act XI of 1865.

But sched. i of Act XII of 1876, amending Act XX of 1847, has now re-transferred the jurisdiction in such suits to the District Courts.

THIS was a rule calling upon Mahomed Asghur Hossein and Syeddeen Ahmed to show cause why an order of the Officiating Judge of the Small Cause Court of Sealdah, dated 29th May 1880, should not be set aside, and the Judge directed to entertain the suit.

The facts of the case were, that, on the 25th July 1878, one Sheikh Hameedoollah instituted a suit in the Civil Court of the District Judge of the 24-Parganas to recover Rs. 375 as damages against one Mahomed Asghur Hossein and another for infringement of copyright arising out of the publication of a certain Bengali book. On the 4th September 1878, the District Judge directed the plaint to be returned, on the ground that the ordinary Civil Court had no jurisdiction, the suit being one for damages; and that the suit should have been brought in the Small Cause Court.

Sheikh Hameedoollah thereupon filed his suit in the Small Cause Court of Sealdah; and, on the 28th December 1878, the Judge of the Small Cause Court passed a decree in his favor.

The plaintiff took out execution of this decree and attached cer-

* Rule, No. 939 of 1880, against an order of Baboo Balloram Mullick, Officiating Judge of the Small Cause Court at Sealdah, made in suit No. 1589 of 1880, dated the 29th May 1880,

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tain property of the defendants. The defendants paid up Rs. 450, which was received in full satisfaction of the decree, and at the same time a petition dated 4th March 1879 was filed in Court by the judgment-debtors, stating that the plaintiff had relinquished all claim to damages, and had received Rs. 450 in satisfaction of the decree, and that they the judgment-debtors, agreed for the future to abstain from publishing and selling any book registered in the name of the decree-holder, and of which he had acquired the copyright; and further stated, that should they break this agreement, they would be liable to be sued for damages, and also for the damages already relinquished.

The defendants having again infringed the plaintiff's copyright in a second book, the plaintiff, on the 29th March 1879, instituted a suit for damages, and the damages relinquished under the petition of the 4th March 1879, against the defendants in the Small Cause Court. On the 29th May 1880, the Judge of the Small Cause Court dismissed the suit, on the ground that he had no jurisdiction to entertain a suit of such a nature. As regards the question of jurisdiction, the Judge stated as follows :

"It appears to be pretty clear that prior to the passing of Act XX of 1847, it was extremely doubtful whether the right called "copyright" could be enforced in British India at all, and the Legislature had doubts as to the applicability of the English Common Law to Indian cases. To remove these doubts the Act was passed with a view to afford relief to the wronged, so that the relief which the owner of an infringed copyright is entitled to, in this country is purely statutory. That being so, the plaintiff must conform to the Statute regarding the form of his action. Sections 1 and 13 enumerate the remedies,—i.e., he may sue to recover the books printed without authority or for damages for the detention thereof, or sue for damages for the conversion thereof in trover. The present action is neither one of detinue or trover so far as the language of the plaint goes, but it is the former by implication, plus a claim for damages for the detention of the book. Section 7 defines the Courts empowered to try such suits,—viz., 1, the Supreme Court; 2, the Zillah Courts. Where the second class of Courts does not exist, the suits are triable in the highest local Court exercising original civil

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jurisdiction. So that when s. 13 speaks of the institution of cases in other local Courts, the definition given in the 7th section should not be overlooked. . . . It was further contended that the defendants have, by the solenamah, dated 4th March 1879, contracted not to infringe the copyright, and that therefore the case is one for breach of contract, which the Small Cause Court is competent to try under s. 6 of Act XI of 1865. The solenamah is no contract at all, it is merely a recognition of the plaintiff's copyright, the defendants promising to abstain from printing books in which the plaintiff had a copyright. . . . But supposing it to be a breach of contract case, jurisdiction to try it has been taken away by s. 11 of the Civil Procedure Code from the constituted Civil Courts. Section 11 has not been extended to the Small Cause Court, but s. 47 of Act XI of 1865 extends the provisions of the Procedure Code to Small Cause Courts cases as far as they are applicable; it cannot be the intention of the Legislature to give the Small Cause Court power to try cases which, under s. 11 of the Civil Procedure Code, are within the exclusive jurisdiction of other Courts. I, therefore, hold that the Small Cause Court has no jurisdiction."

At the hearing of the rule

Moonshee Mahomed Yussooff appeared for the plaintiff.

Baboo Umesh Chunder Banerjee for the defendants.

The judgment of the Court (GARTH, C. J., and FIELD, J.) was delivered by

GARTH, C. J.—I think that this rule should be discharged.

The plaintiff in the first instance brought a suit against the defendants in the District Court of the 24-Parganas for an alleged infringement of his copyright. The Judge of the 24-Parganas dismissed the suit, upon the ground that, being a suit for damages, it ought to have been brought in the Small Cause Court.

The plaintiff then brought a suit in the Small Cause Court at Sealdah, and there the defendants took the objection that the suit could not be brought in the Small Cause Court, but should

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have been brought in the District Court of the 24-Parganas. The Small Cause Court dismissed the suit upon that ground; and this rule was then obtained by the plaintiff to set aside the order of the Small Cause Court, dismissing his suit and directing that Court to try the cause upon the ground that it was properly cognizable there.

In support of the rule, the learned pleader has now called our attention to a case decided in the year 1859 by Sir B. Peacock and two other Judges, *Jodoonath Mullick v. Yawarally* (1).

In that case it was no doubt decided that, since the passing of the Small Cause Court Act of 1850, a suit for the infringement of copyright in Calcutta must be brought in the Court of Small Causes, and not on the Original Side of this Court; and the grounds of the decision were these: the Copyright Act (XX of 1847) had in effect provided in s. 7 that "if any person infringed a copyright, the offender, if the offence was committed within the local limits of the jurisdiction of any of the chartered High Courts, should be liable to an action in such Court; and that if he offended in any other part of the British territories, he should be liable to a suit in the highest local Court exercising original civil jurisdiction."

That being the law in 1847, the Presidency Small Cause Courts' Act was passed in 1850, giving the Small Cause Court exclusive jurisdiction in all suits for damages up to a certain amount; and Sir B. Peacock and the other Judges held in that case that, by that Act, the jurisdiction, which had been given to the High Court by the Act of 1847, was transferred to the Small Cause Court in suits up to the prescribed amount for infringement of copyright.

By that decision, which appears to me quite correct, we are of course bound; and by a parity of reasoning, the Mofussil Small Cause Courts, when they were established in 1865, obtained exclusive jurisdiction in the mofussil to try suits for damages for infringement of copyright up to a certain amount. But since these Small Cause Court Acts were passed, s. 7 of Act XX of 1847 has been amended by Act XII of 1876; and that section now

in effect runs thus :—" If any person shall infringe any copyright, the offender shall be liable to a suit *in the highest local Court exercising original civil jurisdiction.*" As, therefore, by the Act of 1865 the Legislature transferred the jurisdiction in cases for infringement of copyright up to a certain amount from the District Courts to the Small Cause Courts, so the Act of 1876 has re-transferred the jurisdiction in such suits back again to the District Courts.

This appears to me the plain meaning of the Legislature, and it is certainly founded on much good reason; for these suits for infringement of copyright involve questions of great difficulty, and should be tried by the Court most competent to deal with them.

It is hard in this particular case that the plaintiff should have had to pay the costs of both Courts; and although we must discharge this rule, we do so without costs.

FIELD, J.—I am of the same opinion. The effect of the decision quoted from Gasper's Reports is, that the class of cases provided for by s. 7 of the Copyright Act, XX of 1847, was transferred to the jurisdiction of the Calcutta Small Cause Court by Act IX of 1850, notwithstanding the express language used in s. 7 of the former Act. By analogy the jurisdiction in the same class of cases arising in the mofussil was transferred to the jurisdiction of the Mofussil Small Cause Court by Acts XLII of 1860 and XI of 1865. Had the law remained in the position in which it then stood, there can be no doubt but that this case would have been cognizable in the Small Cause Court; but in 1876 the Legislature stepped in and repealed a considerable portion of s. 7 of Act XX of 1847.

Eliminating the matter thus repealed, the section now stands as follows :—" If any person shall print, or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent in writing of the proprietor thereof, or shall have in his possession for sale or hire any such book so unlawfully printed without such consent as aforesaid, such offender shall be liable to a suit in the highest local Court exercising original civil jurisdiction."

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It appears to me that the section as so altered must be regarded as a fresh enactment of the Legislature; and this being so, there can be no doubt that the intention of the Legislature is, that these cases arising in the mofussil should now be tried in the Court exercising the highest original civil jurisdiction, which in the present instance is the Court of the District Judge.

Rule discharged.

ORIGINAL CIVIL.

Before Mr. Justice White.

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Limitation Act (XV of 1877), sched. ii, art. 180—Execution of Decree—Revivor—Civil Procedure Code (Act X of 1877), ss. 230, 245, 248—Scire facias, Writ of.

The plaintiff obtained a decree in 1864. The first application for execution was made in September 1869 under s. 216 of the Civil Procedure Code (Act VIII of 1859); and after notice to the defendant as provided thereby, an order was made under that section for execution to issue. In September 1880, an application for execution was made under s. 230 of the Civil Procedure Code of 1877, which repealed Act VIII of 1859.

Held, that the order, after notice, had the effect of reviving the decree within the meaning of art. 180, sched. ii, Act XV of 1877, and therefore the decree was not barred by the law of limitation.

An order for execution under the Code made after notice to show cause has, on the Original Side of the Court, the same effect as an award of execution in pursuance of a writ of *scire facias* had under the procedure of the Supreme Court, *i.e.*, it creates a revivor of the decree.

The clause of s. 230 of Act X of 1877, which prohibits a subsequent application for execution, only applies where the previous application has been made under that section, and not where such previous application has been made under Act VIII of 1859.

IN this case the plaintiff obtained a money-decree in the High Court against the defendant on the 16th of November 1864. The first application for execution of this decree was made on the 18th September 1869, when the Court ordered a writ of attachment to issue against the person of the defendant. After several fruitless attempts to execute this and other subse-

quent similar writs, the plaintiff ultimately succeeded in arresting the defendant on the 28th of January 1873, and he was committed to jail. The defendant lay in jail for two years without satisfying the decree; and at the end of that time was released under the provisions of the Code of 1859, which limited imprisonment under a decree to two years.

In the meanwhile, the plaintiff had the decree transmitted for execution to the District Court at Hooghly; and that Court, upon an application made on the 20th of August 1874, ordered the right, title, and interest of the defendant in certain property within its jurisdiction and in the possession of the defendant to be attached.

When this was done, the defendant and his brother preferred a claim, on the ground that the property attached was *debutter* property. The claim was disallowed; and the defendant and his brother, on the 4th December 1874, brought a suit to establish that the property was *debutter*, and therefore not liable for the defendant's debts. This suit was carried through the various Courts of this country to the Privy Council, where it was finally decided, on the 6th of July 1879, that the defendant had, subject to the trusts for the idol, a saleable interest in the property attached. This interest was accordingly sold in July 1880 and realized Rs. 273-11. With the exception of this sum, no money was realized by the plaintiff under the decree, and there remained a balance due of Rs. 11,977-7. The plaintiff having, as he alleged, recently ascertained that the defendant possessed some immoveable property within the original jurisdiction of the High Court, procured the decree to be brought back to that Court; and, on the 15th September 1880, obtained the present rule, calling on the defendant to show cause why the decree should not be executed.

Mr. T. A. Apar now showed cause and contended, that if s. 230 of the Civil Procedure Code applied to this application for execution, the application was barred, inasmuch as more than twelve years had elapsed from the date of the decree, and no fraud or force had been shown on the part of the judgment-debtor to prevent the execution of the decree within that time; see

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1880 cl. (a), s. 230. That was the only exception in that section
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Mr. *Kennedy* (with him Mr. *Bonnerjee*), in support of the rule, contended, that there had been both payment and revivor within the meaning of art. 180 of Act XV of 1877. Any payment would be sufficient, and the plaintiff has admittedly received a portion of the debt since taking out execution. [WHITE, J.— That was not a payment, but an exaction.] But even if this is not sufficient, there has been a revivor of the decree by the order of the 18th September 1869. That was an order made after more than a year from the date of the decree, and must be taken to have been made under the then existing procedure, namely, ss. 215 and 216 of Act VIII of 1859. Now those sections were merely an express enactment continuing the procedure by *scire facias* as it existed in the Supreme Court as part of the law of England. That law is laid down in Tidd's Practice, vol. ii, p. 1103, which shows that one of the cases in which writs of *scire facias* were issued was where a

judgment was more than a year old, in which case the judgment-creditor had to cause the writ to be issued, calling on the debtor to show cause why execution should not be allowed. There were two cases in which writs of *scire facias* were in general use; the other being where the judgment-debtor was dead. With respect to a writ issued after the death of the judgment-debtor, it was held that it created a new right and was not a mere continuation of the suit—*Farrell v. Gleeson* (1) and *Farran v. Beresford* (2). These cases were afterwards cited before the Privy Council in Ireland in *In the matter of Blake* (3) and *Griffin v. Blake* (4), where the question was, whether there was any distinction between the effect of a writ of *scire facias* issued after the death of the debtor, and one issued because the judgment was more than a year old; and it was there held there was no distinction, and that the latter equally created a new present right to receive the debt. What was meant by a revivor is shown too in Fitzherbert's *Natura Brevium*, p. 266. Without this procedure the judgment could not be enforced. This then was the procedure in force in the Supreme Court in 1859, when the Civil Procedure Code and the Limitation Act of that year were passed. It is submitted that the Legislature intended to substitute the procedure laid down in ss. 215, 216 of the former Code for the proceeding by *scire facias*, and that the effect of a notice under the latter section should have the same effect as the issue of the writ. The words used in s. 19 of the Limitation Act of 1859 have been continued down to the present time—see art 180, sched. ii of Act XV of 1877; and the procedure in ss. 215, 216 of Act VIII of 1859 is continued in ss. 245, 248 of Act X of 1877. [WHITE, J. — There is nothing about revivor in s. 248 of the Civil Procedure Code. Does the taking proceedings under s. 248 have the effect of reviving the decree, notwithstanding that omission?] It is submitted it has; the notice gives a new right, just as the *scire facias* did. The Civil Procedure Code was passed prior to the Limitation Act; so, supposing there is an error, the latter Act should guide the Court. [WHITE, J.—Section 230 of the Code seems to prohibit the

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(1) 11 Cl. and Fin., 702.

(3) 2 Ir. Ch. Rep., 643.

(2) 10 Cl. and Fin., 319.

(4) *Id.*, 645.

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Court altogether from entertaining the application.] As to s. 230 of the Procedure Code of 1877 it is submitted it does not apply. Act X of 1877 does not apply to "any proceedings after decree that may have been commenced and were still pending" on the 1st October 1877, when the Act came into force; see s. 3 as amended by Act XII of 1879. This section was altered on account of the Full Bench ruling in *Runjit Singh v. Meherban Koer* (1). These proceedings were prior and pending at that time. Besides, s. 230 says, that the prior application must have been made under that section, otherwise the section does not apply. [WHITE, J. — It was made under the provisions of the then Code of Civil Procedure, which were to the same effect as s. 230.] The words are express "under this section," not "under the Procedure Code," which would have been probably used if the intention of the Legislature had been other than I contend it was. As to fraud on the judgment-debtor's part, it is submitted that his saying his property was *debutter* amounted to fraud; it was really concealing his property. [WHITE, J. — I can't say he had no ground for saying so. Two Courts decided in his favor.]

Mr. T. A. Apcar was allowed to reply. — The proviso in s. 3 of Act X of 1877 does not apply. This proceeding had not commenced, nor was it pending, before 1st of October 1877. What was pending was the proceeding in execution against the *debutter* property, which has been satisfied. Though the Limitation Act received the assent of the Governor-General subsequently to the Civil Procedure Code, yet both Acts came into force together. The means by which execution is to be obtained is the Civil Procedure Code alone, and the Court is bound by the words of that Code. If it was intended to introduce the writ of *scire facias* into the Code of 1859, the intention would have been made clear. The introduction of the word "revive" in the Limitation Act may well have been to exclude the writ of *scire facias*, inasmuch as that writ had been done away with by the Common Law Procedure Act of 1852. It is submitted that s. 230 of the Code of Civil Procedure is not

limited to cases in which a previous application has been made under that section, but is applicable to the present case. [Mr. Kennedy referred to *Byraddi Subbareddi v. Dasappa Rau* (1), *Sohan Lal v. Kurim Buksh* (2), and *Ram Kishen v. Sedhu* (3), to show that unless a previous application has been made under s. 230 that section does not apply.]

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Cur. adv. vult.

WHITE, J. (after stating the facts as above, continued):—The decree is more than twelve years old, and as such execution would be barred under art. 180, sched. ii of the Indian Limitation Act, 1877. But Mr. Kennedy, for the plaintiff, has contended with much ability and learning, that the order of this Court of the 18th of September 1869 was a revivor of the decree within the meaning of the proviso attached to the foregoing article, and which is in these words, “provided that when the judgment or decree has been revived . . . the twelve years shall be computed from the date of such revival, or the latest of such revivals.”

The petition does not state how the order of the 18th of September 1869 came to be made. But it was made long after the Code of 1859 had been applied to this Court on its Original Side. It also appears to have been the first order for execution which issued upon the decree, and to have been made after the lapse of more than a year from the date of the decree; so I must take the order to have been made under ss. 215 and 216 of the Code of 1859, and, therefore, after notice to the defendant to show cause why the decree should not be executed against him.

The corresponding sections to those in the Code of 1877 are ss. 245 and 248, the latter of which enacts that notice to show cause must issue, “if more than a year has elapsed between the date of the decree and the application for its execution.”

In neither of the Codes is an order for execution made after notice under these foregoing sections, described as reviving the decree. The question is, whether it has that effect,

(1) I. L. R., 1 Mad., 403.

(2) I. L. R., 2 All., 281.

(3) I. L. R., 2 All., 275.

1880 and is what the Legislature had in mind when it speaks in
 ASHOOTOSH the present Limitation Act of the revival of a decree.
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 DOORGA The proviso in question is a transcript of one in the repealed
 CHURN Limitation Act of 1871, and in tracing back to its source, the
 CHATTERJEE language used in the proviso, we find the words first used in
 s. 19 of Act XIV of 1859, which enacts, that "no proceeding
 shall be brought to enforce a judgment or decree of a Court
 established by Royal Charter but within twelve years from the
 decree, unless in the meantime such decree shall have been duly
 revived. . . . and in such case no proceeding shall be
 brought to enforce the decree but within twelve years after
 such revival or the latest of such revivals."

This was the first Limitation Act of the Legislature of India which applied to the Chartered Courts at the three Presidencies. In 1859, these Courts were governed by their own procedure. It was part of that procedure that execution could not issue upon a judgment more than a year old without suing out a writ of *scire facias* against the defendant. The 195th of the repealed rules of 1851 on the Plea Side of the old Supreme Court of Calcutta recognises the procedure to be such.

The writ of *scire facias* was introduced into the Chartered Courts from the English law, and that law governed its operation and effect. By the common law of England, in the case of judgments in personal actions, if more than a year and a day passed without execution, the plaintiff's only remedy was an action of debt upon the judgment. The Statute of Westminster the 2nd, 13 Edward I, c. 45, gave the plaintiff the alternative remedy of suing out a *scire facias* (4 Comyn's Digest, Title Execution, A. 4 and I. 4; Tidd's Practice, p. 1102). The effect of an award of execution in pursuance of the *scire facias* was to revive the judgment. It is so stated in Tidd's Practice, p. 1103; and the point is placed beyond controversy by *Farrell v. Gleeson* (1) and *In the matter of Blake* (2), before the Judicial Committee of the Privy Council in Ireland. These cases decide that *scire facias* upon a judgment is not a mere continuation of a former suit, but creates a new right. It would appear from Tidd's Practice, p. 1106, citing a case

(1) 11 Cl. and Fin., 702.

(2) 2 Ir. Ch. Rep., 643.

from 2 Salkeld, 598, that although subsequent writs of *scire facias* may be taken out, and it may be necessary to take them out, it is the first *scire facias* which revives the judgment. It is unnecessary, however, to determine in this case how that may be, as the first order for execution in the present case is less than twelve years old.

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There was then, at the date when the Limitation Act of 1859 came into force, a proceeding in the Supreme Court which had unquestionably the effect of reviving a judgment. This proceeding has since been displaced by a new proceeding, which in substance is the same as the old proceeding. It commences with a notice to show cause why the decree should not be executed, and terminates with an order for execution, which is tantamount to the award of execution under the *scire facias*. Inasmuch as the Legislature has, notwithstanding the change in procedure, retained in the present Limitation Act the language of the Act of 1859, and prescribed a fresh point of departure for the twelve years in the case of a judgment that has been revived, and inasmuch as I am bound to give effect, if possible, to every part of the language of the Legislature in the Limitation Act, I must hold that an order for execution under the Cole made after notice to show cause has, on the Original Side of this Court, the same effect of reviving the judgment as the *scire facias* had.

It is contended for the defendant that though the order of the 18th of September 1869 may have revived the judgment, I am precluded from granting the present application by that part of s. 230 of the Code now in force which prohibits this Court from granting, except under certain circumstances, a subsequent application where the decree is more than twelve years old.

Section 230 of the Code, as it stood when the Code was passed in 1877, prohibited the granting of a subsequent application for execution of a decree more than twelve years old, unless the Court was satisfied that due diligence had been used to obtain satisfaction under the previous order for execution. As the section now stands, amended by the Act of 1879, it prohibits the grant of a subsequent application, no matter what diligence may have been used, unless the judgment-debtor has, by

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fraud or force, prevented the decree from being executed within the twelve years. The consequence is, that if from the mere impecuniosity of the judgment-debtor a decree remains unsatisfied for twelve years, no further order for execution can be made. No fraud or force has been found to exist in the present case, but Mr. Kennedy argues that this part of s. 230 only applies where the previous application for execution was actually made under s. 230, and not where, as here, the previous application was made under the Code of 1859. The language employed in s. 230 is this, "Where an application to execute a decree has been made under this section and granted, no subsequent application to execute the same decree shall be granted after the expiration of twelve years, &c."

The natural meaning of the foregoing language is, that the previous application must be one made under s. 230. Mr. Kennedy has cited the cases of *Byraddi Subbareddi v. Dassappa Rau* (1) and *Ram Kishen v. Sedhu* (2), in which these Courts considered that the restriction upon the subsequent application only applied where the previous application had been made under s. 230. The effect of this new provision in s. 230 is to cut down the right of a judgment-creditor to procure execution to issue upon an unsatisfied judgment.

I am of opinion that the restriction does not affect the present application, and that, consequently, I am not prevented from making this rule absolute.

When the case occurs of a subsequent application for execution after the grant of a previous application under s. 230, a somewhat difficult question may arise how to reconcile the language of that section with the proviso in art. 180 of sched. ii of the Limitation Act of 1877; but it is unnecessary now to pronounce any opinion upon the point.

The rule will be made absolute with costs, and execution will issue for the balance remaining due under the decree.

Rule absolute.

Attorney for the plaintiff: Mr. *Hechle*.

Attorneys for the defendant: Messrs. *Ghose and Bose*.

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Field.

LATCHMAN PUNDEH (DECREE-HOLDER) v. MADDAN MOHUN SHYE
AND OTHERS (JUDGMENT-DEBTORS).*

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Execution of Decree—Court which passed the Decree—Civil Procedure Code (Act X of 1877, as amended by Act XII of 1879), ss. 223, 649—Limitation Act (XV of 1877), sched. ii, art. 179, cl. 4.

Per GARTH, C. J.—Section 649 of the Civil Procedure Code as amended by Act XII of 1879, which explains the meaning of the expression the “Court which passed the decree,” does not *exclude* the Court which originally passed the decree as being a Court in which an application for execution should be made, but merely *includes* another Court.

When, therefore, a Court which has passed a decree has ceased to have jurisdiction to execute it, the application for execution may be made either to that Court, although it has ceased to have jurisdiction to execute the decree, or to the Court which (if the suit wherein the decree was passed were instituted at the time of making application to execute it) would have jurisdiction to try the suit.

Per FIELD, J.—A Court does not cease to be “the Court which passed the decree” merely by reason that the head-quarters of such Court are removed to another place, or merely because the local limits of the jurisdiction of such Court are altered.

An application for the transfer of a decree under the provisions of s. 223 and the following section of Act X of 1877, is a step in aid of the execution of the decree within the meaning of cl. 4, art. 179, sched. ii of Act XV of 1877.

THE facts of this case are sufficiently stated in the judgments.

Baboo *Trailakanauth Mitra* for the appellant.

Baboo *Rash Behary Ghose* for the respondents.

GARTH, C. J.—A suit was brought in the Court of the Munsif of Maubazaar, to recover the sum due upon a mortgage-bond, and to realize that sum by sale of the mortgaged

* Appeal from order No. 226 of 1880, against the order of Baboo Brojendro Coomar Seal, Additional Judge of Bancoora, dated the 26th June 1880, affirming the order of Baboo Hemanga Chundro Bosu, Munsif of Katra, dated the 22nd March 1880.

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property; and a decree was made accordingly. That decree was dated the 5th of December 1876, and on the 5th of December 1879 an application was made to the same Munsif, who had then removed his Court to Barabazaar, for execution of the decree.

In the meantime the particular area in which the mortgage-property was situate had been removed from the Munsifi of Manbazaar to the Munsifi of Katra.

The Munsif of Manbazaar entertained the application for execution, and, considering that he had jurisdiction to deal with it, he sent it with the usual certificate to the Court of the District Judge of Bancoora to be executed, and that Judge sent it on to the Munsif of Katra for execution.

It was then objected that the application for execution had not been made to the proper Court, and that the execution-creditor was bound to apply, under s. 230 of the Code of the Civil Procedure, to the Munsif of Katra, within whose jurisdiction the mortgaged property then was, he being the proper officer, as it was contended, to whom the application should have been made; and that as the application had been made to the Munsif of Manbazaar, the decree could not be executed; and moreover, the Munsif of Katra appears also to have held, that as three years had gone by from the time when the decree was obtained, no fresh application could be made to him as the Munsif of Katra. He accordingly refused to execute the decree on those grounds.

That decision was then appealed to the District Judge of Bancoora, and he held that the Munsif was right, and that the plaintiff was under a mistake in making his application originally to the Munsif of Barabazaar.

The consequence is, that the application for execution has been refused by both the Courts.

The case now comes before us on appeal; and it seems to depend upon the proper construction of the execution sections of the Code of Civil Procedure, the real point being, whether the Court of the Munsif of Barabazaar was the Court to which, under the circumstances, the plaintiff had a right to apply.

Now s. 223 of the Code of Civil Procedure provides, that

a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution, and by the Amending Act XII of 1879, an addition has been made to s. 649 of the Code to the effect, that the words "the Court which passed the decree," as used in Chap. XIX of the Code, is to be deemed to include, where the Court which passed the decree to be executed has ceased to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed were instituted at the time of making the application for execution of the decree, would have jurisdiction to try the suit.

Now it is to be observed that this clause, which explains the meaning of the expression "the Court which passed the decree," *does not exclude* the Court which originally passed the decree as being a Court to which the application should be made, but only *includes* another Court; and I take the meaning of the clause to be this, that where the Court which passed the decree has ceased to have jurisdiction to execute it, the application for execution may be made either to that Court, although it has ceased to have jurisdiction to execute the decree, or to the Court which, if the suit wherein the decree was passed were instituted at the time of making application to execute it, would have jurisdiction to try the suit.

Now there is no doubt that if this suit had been instituted at the time of making the application for executing the decree, it must have been brought in the Court of the Munsif of Katra. But then the applicant, as I take it, has a right to apply either to that Court or to the Court which passed the decree, which is the Court of the Munsif of Barabazaar. The Court of the Munsif of Barabazaar is not less the Court which passed the decree, merely because that Court has changed its name from the Court of Manbazaar to the Court of Barabazaar. It is the self-same Munsif and the self-same Court, and it is not less the Court of the Munsif of Manbazaar because its position or its name has been changed.

It seems to me, therefore, that the plaintiff had a right to apply to the Munsif of Barabazaar to execute the decree, and that Court having entertained the application, and having sent it to the District Court of Bancoora, and the District Court having

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sent it in due course to the Munsif of Katra for execution, the Munsif of Katra was bound to execute it.

Even supposing it had been necessary to make a fresh application to the Munsif of Katra, I still consider that the plaintiff would be in time, because the application which he made was made to the proper Court within three years from the date of the decree, and thus he would have three years more from the date of that application. But it really is not necessary to decide this, because I consider that the plaintiff made the application to the proper Court within the proper time, and that the Court to which it was sent is bound to execute it.

The appeal must, therefore, be decreed, and the case must go back with directions to the Munsif of Katra to execute the decree. The appellant will have his costs in all the Courts; the hearing fee for this Court being fixed at two gold-mohurs.

FIELD, J.—The decree which forms the subject of these proceedings was passed on the 5th of December 1876 by the Munsif of Manbazaar. Subsequent to the passing of that decree, the head-quarters of the Manbazaar Munsifi were transferred from Manbazaar to Barabazaar, and the local limits of the jurisdiction of the same Munsifi were altered by transferring certain thanas to the district of West Burdwan and forming them into, or uniting them within, another Munsifi, termed the Katra Munsifi.

On the 5th of December 1879, the decree-holder applied to the Munsif of Manbazaar, then stationed at Barabazaar, to have his decree executed. The decree was a money-decree, which also declared a lien on certain immoveable property. This immoveable property was, at the time of making the decree, within the jurisdiction of the Manbazaar Munsifi; and by reason of the transfer to which I have adverted, became subsequently, and was on the 5th of December 1879, a portion of the local jurisdiction of the Katra Munsifi.

The lower Courts appear to be of opinion that because this immoveable property was no longer within the jurisdiction of the Manbazaar Munsif, this Munsif had no jurisdiction to execute or to entertain an application for the execution of the decree.

It appears to me that this view is an erroneous one. The jurisdiction to execute a decree is given by s. 223 of the Code of Civil Procedure; and according to that section a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution under the provisions of the Act thereafter contained.

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Now it appears to me that the Munsif's Court at Manbazaar did not cease to be "the Court which passed the decree" merely by reason that the head-quarters of the Munsif had been moved to another place, or merely by reason that the local limits of the jurisdiction of the Munsif were altered. This being so, it is clear that the execution of the decree might have been had in the Court of the Munsif of Barabazaar.

A good deal of discussion has taken place during the argument in this case about the meaning of s. 649 of the Amended Code of Civil Procedure. That section provides that the expression in Chap. XIX of the Code, "Court which passed the decree," or words to that effect, shall, unless there be anything repugnant in the context, be deemed to include, where the decree to be executed is passed in appeal, the Court which passed the decree against which the appeal was preferred; and where the Court which passed the decree to be executed has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed were instituted at the time of making application for execution of the decree would have jurisdiction to try such suit."

It has been contended, that because the immoveable property included in the decree is now situated within the jurisdiction of the Katra Munsif, therefore the application for the execution of the decree must be made to the Katra Munsif's Court, because if a suit were now to be brought in respect of such immoveable property, such suit must be instituted in the Katra Munsif's Court. It appears to me that this contention is untenable, for the Court which passed the decree has not ceased to exist or ceased to have jurisdiction to execute it.

The words of the section (649) are, it may be observed, in extension of the original and literal meaning of the expression "Court which passed the decree." The definition contained

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in s. 649 was not intended by the Legislature to limit or confine the natural meaning of the expression "Court which passed the decree" to the exact instances stated in the new section. This is the usual interpretation put upon the word "include" when employed in the definition portion of a Statute. See *Reg. v. Kershaw* (1); *Ex parte Ferguson* (2); *Pound v. Plumstead Board of Wards* (3); and *Doed Edney v. Benham* (4). It follows, therefore, that the expression "Court which passed the decree" must in this case still include the Court of the Munsif of Barabazaar.

The words in s. 649, which have reference to the Court which passed the decree ceasing to exist, refer to a class of cases not uncommon in these provinces, in which a Small Cause Court having been in existence for a certain number of years has afterwards been abolished by an order of the Local Government (see s. 3 of Act XI of 1865). The application for execution of a decree passed by such an abolished Court must now be made to the Munsif who would have jurisdiction to entertain the suit in which such decree was made, if such suit were instituted at the time when application for such execution is made. Another example is, where the Sudder Ameen who had jurisdiction throughout the whole of the district with a pecuniary limit exceeding that of a Munsif was abolished as such, the officer who was Sudder Ameen becoming the Munsif at head-quarters with a local jurisdiction limited to a single Munsifi usually that at head-quarters. See cl. 2, s. 4, read with s. 8 of the repealed Act XVI of 1868. A decree passed by such a Sudder Ameen who had a local jurisdiction over the whole district could, therefore, be executed in the Court of the Munsif before whom a suit would now be instituted in respect of the claim for which the decree was passed by the Sudder Ameen. In the absence of these provisions, and after the repeal of Act XVI of 1868, there was doubt as to the Court which had jurisdiction to execute such a decree. While cl. 2 of s. 4 and s. 8 of Act XVI of 1868 remained in force, application for execution must have been made to the Court of the

(1) 6 E. and B., 999, at p. 1097.

(3) L. R., 7 Q. B., 183.

(2) L. R., 6 Q. B., 280, at p. 291.

(4) 7 Q. B., 976, at p. 979.

Sudder Munsif; but in this case, if the decree-holder sought to attach and sell property situate within the existing local limits of jurisdiction of another Munsif, it would have been necessary to transfer the decree to such Munsif for execution under the provisions on this behalf contained in the Code.

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The words "cease to have jurisdiction to execute it" in s. 649 were intended to meet such a case as the following;—for example, where an Additional or Subordinate Judge, attached to more than one district, having passed a decree in one district, leaves this district and sits in another district under the provisions of s. 15 of the Bengal Civil Courts Act, such Additional or Subordinate Judge is a Court. When such a Court is sitting in a district other than that in which the decree was passed, it has not ceased to exist, but it has ceased to have jurisdiction to execute that particular decree. Under the provisions of s. 649, application for execution can then be made to the Court which at the time of making the application would have jurisdiction to entertain the suit in which the decree was passed.

It being thus clear that an application for the execution of the decree in this case could be made to the Munsif of Manbazaar or Barabazaar, whose Court was, in the literal sense of the term, the Court which passed the decree, it was competent to the Manbazaar Munsif to transfer this decree for execution under the provisions contained in s. 223 to the Katra Munsif. When the decree was so transferred, it was the duty of the Katra Munsif to proceed under the provisions of the Code to effect the execution thereof.

I may here observe that there is a distinction between the jurisdiction of the Court to execute the decree and the circumstances under which effective execution can be had. Clause (c) of s. 223 appears to me to have direct reference to a case like the present. The Munsif of Manbazaar could not make a decree directing the sale of the immoveable property included in the present decree, unless at the time when the plaint was filed in the case in which such decree was made that property was situate within the local limits of the jurisdiction of his Court. The fact of the site of this property having been, subsequent to

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the making of the decree, placed outside the local limits of his jurisdiction, brings the case within cl. (c).

There is one more point in the case which it is necessary to notice, and that has reference to the Limitation Act. I have pointed out that, in my opinion, the Munsif of Barabazaar, as being the Court which passed the decree, was competent to execute it. Execution might have been had against the person or moveable property of the judgment-debtor, if at any time found within the jurisdiction of the Barabazaar Munsif. But if no such execution could be had, because the judgment-debtor did not reside or come within, and had no moveable property within, such Munsif's jurisdiction, it is clear that the only course open to the decree-holder to obtain effective execution would be to apply to the Court of the Barabazaar Munsif under s. 230 to have the decree sent for execution to the Katra Munsif. Now if the application to the Barabazaar Munsif be taken to be not an application for the execution of the decree, but merely an application for the transfer of the decree under the provisions contained in s. 223 and following sections, it appears to me that such an application for transfer is a step in aid of the execution of the decree within the meaning of cl. 4, art. 179 of the second schedule of the present Limitation Act, and that, therefore, the decree-holder would have a fresh period of three years from the date of such application for transfer. Were it otherwise—were the date of the application made under s. 230 to enforce a decree sent to another Court to be taken as the date up to which the period of limitation may extend, inasmuch as no such application can be made until the decree has been sent, a decree-holder would often be barred through no laches of his own, but merely because, although he had applied in time under s. 223 to have the decree sent to the other Court, delay in transmitting it had occurred in consequence of some one of the many causes which retard the completion of office work.

For these reasons, I concur in thinking that the order of the lower Court must be reversed.

Appeal allowed.

Before Mr. Justice Miller and Mr. Justice Maclean.

LUCHMAN LALL (PLAINTIFF) *v.* RAM LALL (DEFENDANT).*

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Dec. 14.

Suit for Adjustment of Accounts of a Partnership—Jurisdiction—Contract Act (IX of 1872), s. 265.

Section 265 of the Contract Act, while it enables a partner, after the termination of a partnership, to apply to the District Court to wind up the business, does not take away the ordinary right of suit in any Civil Court having jurisdiction to have the accounts of the partnership taken.

THIS was a suit for the adjustment of account of a partnership, and to recover a sum of money alleged to be due.

The plaint, *inter alia*, stated, that the plaintiff and defendant entered into partnership for the purpose of carrying on a trade in grain, upon the agreement that each partner should supply a moiety of the capital, and that the profits should be divided equally between them; that the said partnership continued from the 15th May 1877 to the 3rd October of the same year; that during the continuance of the said partnership the plaintiff purchased grain at Roypura, and despatched it for sale to a Calcutta firm, and that part of the grain so purchased was sold at Roypura; that the grain sent to Calcutta was sold under the management of the defendant; that the value of the grain purchased by the plaintiff, together with the price of the bags, amounted to Rs. 3,230-8-3; that the defendant being liable for a moiety of this sum, paid Rs. 1,542-4-1½, leaving a balance of Rs. 73 still due, which sum was paid by the plaintiff in excess of the sum due and paid by him as his moiety of the capital expended; that the plaintiff incurred a further expense of Rs. 193-15-3 for certain additional bags despatched by him to Calcutta; and that the two last-mentioned sums, together with the share of the profit due to him on the sale of the grain in Calcutta, amounted to Rs. 949-5-4½, the subject of the present suit.

* Appeal from Appellate Decrees, Nos. 1726 and 1888 of 1879, against the decree of J. F. Stevens, Esq., Officiating Judge of Patna, dated the 5th June 1879, affirming the decree of Baboo Chuckerdhur Proshad, Second Sudder Muusif of that district, dated the 30th December 1878.

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The defendant, in his written statement, denied the allegations in the plaint in all material particulars, and set out his own version of the partnership transactions, which went to show that the plaintiff was indebted to the defendant. A cross-suit was filed by the defendant against the plaintiff.

The Court of first instance on the facts dismissed the plaintiff's suit. The lower Appellate Court was of opinion, that the present suit was not one for a balance due on a mutually adjusted account, but (the partnership having been already dissolved) an application for winding up the business of the firm under s. 265 of the Contract Act; and that such application could, under that section, only be entertained by a Court not inferior to the Court of a District Judge. The suit having been instituted in the Court of the Munsif, therefore failed on the plea of jurisdiction. For this reason the lower Appellate Court dismissed the appeal.

The plaintiff thereupon appealed to the High Court.

Baboo *Hem Chunder Banerjee* and Baboo *Umakali Mookerjee* for the appellant.

Baboo *Umbika Churn Ghose* and Baboo *Pran Nath Pundit* for the respondent.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J.—These are two cross-suits between persons who at one time were carrying on a partnership business in grain. The object of the suits was for adjustment of account, and for recovery of the money due to each other. The suits were instituted in the Court of the Munsif of Patna. The Munsif dismissed both these suits. There were two appeals; and the District Judge on appeal held, that the Munsif had no jurisdiction to entertain the suit, because, under s. 265 of the Contract Act, it was the District Judge's Court which had sole jurisdiction to grant relief in a case like this. We think that the District Judge is wrong in this view. It has been decided by

the Madras High Court in the case of *Javali Ramasami v. Sathambakam Theruvengadasami* (1), that s. 265 is only an enabling section,—that is to say, it leaves to the option of the plaintiff either to institute proceedings under that section in the District Judge's Court, or to pursue his ordinary civil remedy by instituting a regular suit in the Court which has jurisdiction having regard to the pecuniary value of the suit. We entirely concur in this view of the section, and think that it does not oust the Civil Court from its jurisdiction.

We, therefore, set aside the decisions of the lower Appellate Court, and remand the two cases to that Court for retrial. Costs to abide the result.

Appeal allowed—Case remanded.

APPELLATE CRIMINAL.

Before Mr. Justice Morris and Mr. Justice Prinsep.

THE EMPRESS ON THE PROSECUTION OF JOGENDRONATH BOSE
v. THOMPSON.*

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Jan. 5.

Presidency Magistrates' Act (IV of 1877), s. 124—High Courts' Criminal Procedure Act (X of 1875), s. 147—Dismissal of Complaint after Partial Hearing for want of Attendance of Complainant—Institution of Fresh Proceedings.

An order of dismissal under s. 124 of Act IV of 1877 does not operate as an acquittal.

THIS case came before the High Court under s. 147 of Act X of 1875, on the application of one James Augustus Thompson (who carried on business as Thompson and Coondoo), who had been charged on the 5th August 1880, before the Presidency Magistrate of Calcutta, with having fraudulently retained and kept a telegraphic message sent by the Executive Engineer of Debrooghur, which message ought to have been delivered to one Jogendronath Bose (who carried on business under the name of Thompson, Coondoo, & Co.), and with hav-

* Criminal Rule, No. 301 of 1880, from a decision of Mr. B. L. Gupta, Presidency Magistrate of Calcutta, dated 25th October 1880.

(1) I. L. R., 1 Mad., 340.

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ing dishonestly misappropriated such message to the use of his firm, thereby committing offences under s. 22 of the Indian Telegraph Act (I of 1876), and s. 403 of the Penal Code.

It appeared that James Augustus Thompson was formerly a partner in the firm of Thompson, Coondoo, & Co., and that, during the year 1879, he broke off connection with that firm, and sold his share in the goodwill and stock-in-trade to Jogendronath Bose, his partner in the firm, and he himself set up business under the name and style of "Thompson and Coondoo." The places of business of the two firms were in the same street. It was admitted that James Augustus Thompson had received and opened, some time in August 1880, a telegram addressed to Thompson, Coondoo, & Co., and the defence put in was, that the telegram was received and retained by a mistake and in good faith.

The case came on before the Presidency Magistrate on the 15th September 1880, and part of the evidence was taken; but the hearing was adjourned until the 22nd September, to enable certain witnesses to appear, who were unable to do so on the 15th. On the 22nd the case was called on, and the complainant being absent, the case was dismissed. Shortly after such dismissal, the complainant and his witnesses appeared; and the Magistrate being of opinion that he could not revive the trial, directed the complainant to bring a fresh complaint. This was done on the following day; the accused was again summoned and the trial held on the 20th October, and on the 25th October the Magistrate convicted the accused and sentenced him to pay a fine of Rs. 200.

On the 29th November, a rule under s. 147 of Act X of 1875 was obtained by the accused, calling upon the complainant to show cause why the order of the Presidency Magistrate should not be set aside.

Mr. *Branson* for the accused.

Baboo *Gurudas Banerjee* for the complainant.

The arguments sufficiently appear from the judgment of PRINSEP, J.

The following judgments were delivered :—

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PRINSEP, J. — On a complaint made before the Presidency Magistrate under s. 22 of the Telegraph Act, a summons was issued on the 4th September last, fixing the 15th for the trial. The complainant and two witnesses (the Telegraph clerk and peon) were then examined; and, apparently to enable the complainant to prove that he had purchased the goodwill of the firm who were the addressees of the undelivered telegram, the trial was postponed until the 22nd, summonses being granted to procure the attendance of Mr. C. T. Davis, an officer of the High Court, at 1 p.m. of that day.

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The case was called on towards the commencement of the Presidency Magistrate's sitting, and the complainant being absent "when his name was called six times" the case was dismissed. Within a very short time the complainant appeared, accompanied by Mr. Davis. The Magistrate at once saw the unfortunate result of his precipitate action, and thinking that he could not revive the trial, adopted an alternative course, and directed the complainant to bring a fresh complaint. This was done on the following day; the accused was again summoned, the trial was held on the 20th October, and on the 25th he was convicted and sentenced to pay a fine of Rs. 200.

The matter has now come before us under s. 147 of the High Courts' Criminal Procedure Act (X of 1875), it being contended that the order of the 22nd September last, dismissing the case, amounted to an acquittal, and that, on the facts found by the Presidency Magistrate, the accused has been wrongly convicted under s. 22 of the Telegraph Act.

I observe that the Presidency Magistrates' Act (IV of 1877) practically provides for only one mode of procedure in the trial of offences before a Presidency Magistrate, no distinction being drawn between cases which are appealable to the High Court and those in which the Magistrate's orders are final, except in the manner of recording evidence (s. 115), the preparation of a charge (s. 116), and in the addition to an order of conviction and sentence which is appealable "of a brief statement of the reasons for the conviction" (s. 126). It seems, therefore, that the sections of the Act which provide

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for an order dismissing a complaint apply equally to all trials held by a Presidency Magistrate. The exact effect of an order of dismissal is not declared, except in a case dealt with under s. 32,—i.e., when, after examining a complainant, the Magistrate considers that there are “no sufficient grounds for proceedings.” In such cases it is expressly provided that the “dismissal of a complaint shall not prevent subsequent proceedings against the person complained against.”

The Act, however, permits a Magistrate to dismiss a complaint in consequence of the absence of the complainant at the commencement of the proceedings and upon the day appointed “for the appearance of the accused person, or on any day subsequent thereto on which the case may be called on” (s. 118), or on the day to which the hearing may have been adjourned “in order to secure the attendance of witnesses or for any other reason” (s. 124). In both instances it is left to the discretion of the Magistrate either to dismiss the complaint or again to adjourn the hearing. He is to determine whether he should impose upon the complainant the extreme consequences of his neglect to attend, or whether a further adjournment should be granted.

Mr. Branson, who supports the rule granted in this case, argues that, as s. 32 provides that an order of dismissal passed under certain circumstances shall be no bar to further proceedings, it must be presumed that it was intended by the Legislature that in all other cases such an order shall have the same effect as an acquittal.

On the other hand Baboo Gurudas Banerjee contends with considerable force, that an order of acquittal can be passed only under s. 126, when in a trial the Magistrate “finds the accused person not guilty;” that the law declares that it is only when a complaint is withdrawn with the permission of the Magistrate (s. 125) that any other order operates as an acquittal of the accused person, and that this is borne out by the terms of s. 113.

It is to be regretted that the Legislature, having prominently before it the precise terms of s. 221 of the Code of Criminal Procedure, left any doubt regarding the exact effect of an order of dismissal passed by a Presidency Magistrate. However,

having carefully considered all that has been said on both sides, the terms of the law, and the inference that may legitimately be drawn from any omissions as already noticed, I am of opinion, that an order of dismissal under s. 124 does not operate as an acquittal of the accused. No inference can in my opinion be properly drawn from the express terms of s. 32 that in all other cases an order of dismissal "shall prevent subsequent proceedings against the persons complained against." The rule that *expressio unius est exclusio alterius* cannot be applied when in subsequent sections the law (s. 126) has provided that an order of acquittal shall be passed "if, in any case tried" by a Magistrate, he finds "the accused person not guilty," with only one exception, *i.e.*, where a case has been withdrawn with the Magistrate's permission (s. 125), and when s. 113, in providing for the plea *autrefois acquit*, declares that it should only be raised when a person has "once been tried for an offence, &c., &c." We have, I observe, no definition of what constitutes a trial such as is conveniently given in the Code of Criminal Procedure, but it seems clear to me that when all the evidence which is required by a Magistrate is, as we have in the case before us, not given, and when the Magistrate dismisses the complaint on account of the absence of the complainant before the time fixed for the recommencement of the hearing and the production of that evidence, it cannot be said that the trial has been completed.

Some remarks have been made regarding the inconvenience which would arise if an accused person, after the dismissal of the complaint, was again required to attend to answer it; but it appears to me that, on the renewal of the complaint, the Magistrate can, before he grants a process, consider under s. 32 whether there is any sufficient ground for proceeding, and unless the complainant can satisfy the Magistrate that by reason of the offence complained of being of a serious character, and that the original complaint should not have been dismissed, the Magistrate would be fully justified in declaring that there was "no sufficient ground for proceeding" and in summarily dismissing the complaint.

Under these circumstances I am of opinion that there was

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no legal impediment to the institution of fresh proceedings by the presentation of a fresh complaint, and that, therefore, the objection taken before us should be disallowed. I trust, however, that the injustice which has resulted from the precipitate order of the Magistrate dismissing the complaint will be a sufficient warning to him to exercise the discretion given to him by the law sparingly. In the present instance it was an unjust order, not only because the case had been fixed for trial at a later hour, but because the attendance of the complainant does not appear to have been necessary in order to proceed with the hearing. The serious nature of the offence, it being punishable with imprisonment for two years as well as fine, should also have made the Magistrate hesitate before he terminated the proceedings in so summary a manner, instead of at least allowing it to be called on at a later hour.

As regards the legality of the conviction of the accused person on the facts found by the Magistrate, I see no valid ground of objection. I am, therefore, of opinion that the rule should be discharged.

MORRIS, J.—It is much to be regretted that the Legislature have not declared what is the effect of an order of dismissal under s. 124 of Act IV of 1877. As has been pointed out, the case under consideration before the Presidency Magistrate was one which, under the Code of Criminal Procedure, would be called a warrant case. There had been already one hearing in the presence of the accused, and evidence had been taken. A second hearing was fixed for the 22nd September, but though the accused appeared on that date, the complainant did not appear, and so, under the discretion allowed him by the section, the Magistrate dismissed the complaint. It would have been satisfactory had the law made it perfectly clear that in such a case, in spite of the accused appearing twice to hear, and if necessary to answer to, the complaint made against him, and in spite of that complaint being dismissed, he is liable at any future time to fresh proceedings being taken against him on the same subject of complaint. In s. 32, which deals with a complaint being dismissed upon its presentation after the examination of the complainant, a special provision is inserted that

such "dismissal shall not prevent subsequent proceedings against the person complained against." And in cases under chap. viii, that is of inquiry by the Magistrate into cases triable by the High Court, express provision is made in the event of the absence of the complainant after examination of witnesses in the presence of the accused. The Act declares (s. 87) that the absence of the complainant, except when the offence may be lawfully compounded, shall not be deemed sufficient for a discharge, and a discharge is described as "not equivalent to an acquittal, and no bar to the revival of a prosecution for the same offence."

In a case of lesser gravity under chap. x, triable by the Magistrate himself, when the circumstances are precisely similar,—that is when the accused has appeared and witnesses have been examined, but the complainant has absented himself,—the words of the section (124) are, the "Magistrate may dismiss the complaint." It might reasonably, therefore, be thought that a distinction is purposely drawn by the Legislature between the order to dismiss and the order to discharge, and that the former carries finality with it, whereas the latter does not. At the same time, whatever may have been the real intention of the Legislature in making this distinction of terms, and in the absence of any qualifying provision to the term "dismiss" in s. 124, I am unable to disregard the other considerations which have been pointed out by my learned colleague. The succeeding section (125) deals with the case of a withdrawal of a complaint of a certain description, and contains an express provision that the withdrawal under this section of a complaint shall operate as an acquittal of the accused person. The question naturally suggests itself why, if the Legislature intended a dismissal under s. 124 to operate as an acquittal, it did not make an express provision to that effect, as in the case of a withdrawal under the subsequent section. Again, s. 126 prescribes,—“If the Magistrate in any case tried under this chapter finds the accused person not guilty, he shall record an order of acquittal. If the accused person is convicted, the Magistrate shall pass sentence upon him.”

In the particular case before us the Magistrate, on the 22nd

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September, came to no finding at all, and recorded no order of acquittal or conviction. Having regard to the language of s. 119, I understand the trial of the case to have commenced on the occasion of the first appearance of the accused,—that is, the date fixed for the hearing, and it was not brought to its legitimate conclusion because of the absence of the complainant—a circumstance which is specially contemplated and provided for in s. 124. When, therefore, these sections (124 and 126) are looked at in conjunction with s. 113, which prescribes that a person who has once been tried for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, the conclusion seems to be, that unless the antecedent trial has resulted in a conviction or acquittal, there is nothing in the law which prevents a person being tried again for the same offence. Consequently, an order of dismissal is not a bar to the revival of fresh proceedings.

On the merits I agree in thinking that there is no ground in law for disturbing the decision of the Magistrate. There is evidence which goes to show that the accused Thompson did not act “in good faith,”—that is, with due care and attention,—in retaining and keeping the telegraph message, which on the face of it was addressed to a rival firm.

Rule discharged.

ORIGINAL CRIMINAL.

Before Mr. Justice Prinsep.

THE EMPRESS v. DABEE PERSHAD.

1881
 Jan 29.

Admission made to Police Officer before Arrest—Evidence Act (I of 1872), ss. 25, 26. .

An admission made by an accused person to a Police officer before arrest is admissible in evidence.

In the course of the trial in this case, the *Standing Counsel* (Mr. Phillips) asked a witness on behalf of the Crown, Police Inspector Kristo Chunder Bannerji, to state what the accused

had stated to him on an occasion when the witness had already said that the accused was not under arrest.

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Mr. Sale, for the accused, objected, on the ground that the accused at the time was under arrest. Ultimately, Mr. Sale being permitted to cross-examine the witness on this point, the Court decided that the accused was not at the time under arrest.

The *Standing Counsel* then repeated his previous question to the witness.

Mr. Sale again objected. It is immaterial whether the accused was under arrest or not—*In the matter of Hiran Miya* (1). No statement or admission of any kind made by an accused to a Police officer can be given in evidence. The prohibition contained in s. 25 of the Evidence Act applies to cases where the accused is under arrest or not, while s. 26 deals with cases where the accused is in custody. Section 25 says,—“No confession” (not no confession by an accused person) “to a Police officer shall be proved against an accused person.” The section is wide in its terms, and draws no distinction between admissions and confessions; see *In the matter of Hiran Miya* (1). Section 25 must be construed in the widest and most literal sense; see *The Queen v. Hurribole Chunder Ghose* (2). Nor is it restricted in any way by s. 26. The word “confession” is not defined in the Evidence Act, while the word “admission” is defined. Hence it may be inferred that no distinction was intended to be drawn between them, and that the words were intended to be synonymous for purposes of the Act. See s. 121 of the Criminal Procedure Code (Act X of 1872) passed almost simultaneously with the Evidence Act. There confession embraces confession, admission, and confession of guilt; see also *The Empress v. Rama Birapa* (3) and *Reg. v. Jora Hasji* (4). The decision by Phear, J., in *The Queen v. Macdonald* (5) was not prefaced by argument at the bar, and the report itself is a most meagre one.

(1) 1 C. L. R., 21.

(3) I. L. R., 3 Bomb., 12.

(2) I. L. R., 1 Calc., 207.

(4) 11 Bom. H. C. Rep., 242.

(5) 10 B. L. R. (App.), 2.

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The *Standing Counsel* (Mr. *Phillips*) was not called upon.

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PRINSEP, J.—The question may be put. I agree in the opinion expressed by Phear, J., in *The Queen v. Macdonald* (1) that the Evidence Act draws a distinction between an admission and a confession of guilt. 'The other cases quoted are not altogether on the point.

Before Mr. Justice Prinsep.

THE EMPRESS v. DABEE PERSHAD.

1881

Jan. 31.

Evidence of Witness taken upon Commission, when admissible in Criminal Trial—High Courts' Criminal Procedure Act (X of 1875), s. 76—Presidency Magistrates' Act (IV of 1877), s. 158—Evidence Act (I of 1872) s. 33.

The evidence of a witness taken upon commission is not admissible in a criminal trial held before the High Court, unless it can be shown that such evidence was so taken upon an order made by that Court under s. 76 of Act X of 1875, or unless it is admissible under s. 33 of the Evidence Act.

In the course of the trial in this case, Mr. *Phillips* (*The Standing Counsel*) tendered, and proposed to read, the evidence of one Wayed Mabal Begum, taken upon commission issued by the Committing Magistrate under s. 158 of the Presidency Magistrates' Act (IV of 1877).

Mr. *Salé* for the prisoner objected. Before evidence taken on commission can be read in this Court in a criminal trial, it must be shown that the taking of such evidence was upon an order issued to that effect by the High Court under s. 76 of Act X of 1875. Here the order was made by the Committing Magistrate, and not by the High Court. The reason which induced the Magistrate to issue that commission may have ceased to operate in the time between the commitment and the trial of the Accused in the High Court. Further, if the evidence attempted now to be put in is admissible, it would practically have the effect of subordinating the discretion given to the High Court under s. 76 of Act X of 1875 to the decision of the Magistrate on the same matter; in short, that the opinion of the Magistrate would be binding on this Court. Section 75

of the High Courts' Criminal Procedure Act (X of 1875), authorizes the Court to refer to the evidence of an absent witness, only in cases in which such is admissible under the Evidence Act or some other law on the same subject. There is no law under which the evidence now tendered can be admitted.

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The *Standing Counsel* (Mr. Phillips) for the Crown.—There is evidence in the case that the witness Wayed Mabal Begum is one of the wives of the ex-King of Oudh, and therefore a *pardanashin*. It may, therefore, be presumed that the reasons which induced the Magistrate to grant the commission still exist, and would equally weigh with this Court. Further, s. 158 of the Presidency Magistrates' Act says, that the deposition once taken on commission shall "form part of the record." Section 76 of the High Courts' Criminal Procedure Act only refers to cases where cause has arisen for obtaining evidence on commission after commitment. [PRINSEP, J.—Section 33 of the Evidence Act appears not to be applicable to a case of this kind.]

PRINSEP, J.—The deposition is inadmissible. Section 76 of the High Courts' Criminal Procedure Act contemplates that evidence, when taken upon commission, if intended to be used in the High Court, must be taken upon an order made by that Court under that section. The terms of s. 158 of the Presidency Magistrates' Act, quoted by Mr. Phillips, refer only to the record of the trial or enquiry before the Magistrate. The evidence taken by a commission issued by order of a Magistrate could not here be admissible under s. 33 of the Evidence Act.

APPELLATE CIVIL.

—

Before Mr. Justice Mitter and Mr. Justice Maclean.

1880
Sept. 9.

NEMAI CHARAN DHABAL AND OTHERS (DEFENDANTS) v. KOKIL BAG
(PLAINTIFF).*

Specific Performance—Registration Act (III of 1877), ss. 49 and 50—Oral Agreement, Evidence of—Effect of Oral Agreement as against subsequent Registered Conveyance.

A, by an oral agreement, agreed to grant two mokurari leases of certain properties upon certain terms to *B*, and thereupon executed two mokurari leases in favour of *B*, which were not however registered. Afterwards *A* granted two mokurari leases of the same mouzas, upon terms more favourable to himself, to *C* and *D*, who, at the time of such grant, had notice of *A*'s previous agreement with *B*. Held, in a suit for specific performance brought by *B* against *A*, and to which *C* and *D* were added as defendants, that, notwithstanding the provisions of ss. 49 and 50 of Act III of 1877, *B* could obtain a decree for specific relief, and a declaration that the leases to *C* and *D* were void as against him.

THE plaintiff in this case, which was instituted on the 10th December 1877, sought to enforce specific performance of an oral agreement made between him and the defendant, Raja Nemai Dhabal, under which the latter, in consideration of the payment to him by the plaintiff of a bonus and fees amounting in all to Rs. 270, agreed to grant to him two mokurari pottas of two mouzas in Zilla Manbhum. This agreement, the plaintiff alleged, had been made with him orally on the 13th Assin 1284, corresponding with the 28th September 1877, by the defendant, at his cutcherry; and on that occasion, he, the plaintiff, had paid to the defendant Rs. 32, in advance, as a part-payment of the consideration. The plaintiff further alleged, that, on the 16th of Assin 1284, corresponding with the 1st October 1877, two mokurari papers were drawn up on stamped paper, and executed by the defendant; and that he, the plaintiff, paid on that day a

* Appeals from Appellate Decrees, Nos. 1594 and 1595 of 1879, against the decree of R. Towers, Esq., Officiating Judicial Commissioner of Chota Nagpore, dated the 28th April 1879, affirming the decree of Baboo Syamchand Dhur, Muunsif of Manbazar, dated the 26th June 1878.

further sum of Rs. 138 on account, it being agreed that the balance of Rs. 100 should be paid at the time when the pottas and kabuliats were registered. These mokurari papers were not put in as evidence.

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The raja-defendant denied the oral agreement and the part-payments alleged by the plaintiff. He said, that two persons, named Madhub Mondul and Narain Mondul, had, previous to Assin 1284, been in possession of the two mouzas in question under a temporary lease, and that he, being anxious to let the mouzas upon receipt of an adequate bonus, had invited offers from all directions; that, among other offers which he had received, he had received an offer from the plaintiff to accept a mokurari lease at Rs. 140 per annum, and pay a bonus of Rs. 280 as consideration-money; that, while this offer was under consideration, and before it had been finally accepted, and before a single rupee had been paid on account of bonus, the Monduls had offered to accept a mokurari lease at Rs. 155 per annum, to pay a bonus of Rs. 700, and further to lend him Rs. 500 at a low rate of interest; that no better offer having being made by the plaintiff, he had accepted that of the Monduls, and having received the consideration-money of Rs. 700 from them, made a mokurari settlement with them, and granted them a registered potta, under which they were in actual possession.

The raja-defendant further contended, that the Monduls being in possession of the mouzas, and interested either legally or equitably in the subject-matter and result of the suit, ought to have been joined as defendants.

The Munsif found, first, that the Monduls were not necessary parties, and that the plaintiff had satisfactorily proved his case, and gave him a decree directing that, on payment by him of the balance of the premium or consideration, leases and counterparts should be exchanged.

On appeal from this decision, the lower Appellate Court found it was necessary that Madhub Mondul and Narain Mondul should be made defendants in the suit. This was done, and the suit was remanded to the Munsif to try the following issues:—

1.—Whether the lease given to them was given in good faith, and for value?

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2.—Whether they had notice of the original contract with the plaintiff?

The Munsif on these issues found that Madhub Mondul and Narain Mondul had given value for their lease, and that they had notice of the previous contract. The lower Appellate Court affirmed this finding and dismissed the appeal.

Against this decree all the defendants appealed to the High Court.

Baboo Rash Behary Ghose for the appellants.

Baboo Sreenath Doss and *Baboo Bamachurn Mookerjee* for the respondent.

Baboo Rash Behary Ghose.—This is not a case for specific performance. Taking the case of the plaintiff to be true, that, on the 13th Assin, the raja-defendant promised to execute two mokurari leases in favour of the plaintiff, the plaintiff himself asserts, whether truly or falsely, that the raja-defendant did execute the two mokurari leases; if so, and there was a difficulty about registration, the plaintiff should not have proceeded by separate suit, but should have taken proceedings under parts vii and xii of the Registration Act (III of 1877). If his statement is true, the terms of the oral agreement were reduced into writing on the 16th Assin; if so, the Courts below were wrong in law, when they admitted secondary evidence of the terms of an agreement which had admittedly been reduced into writing; and if that evidence was wrongly admitted there is absolutely no evidence to support the findings of the Courts below. The case is really one in which the plaintiff is endeavouring to evade the operation of the registration law, and by falling back upon a pretended^a anterior oral agreement to use and give effect to two documents, which, if they exist, cannot be received in evidence, and which, if they could be received in evidence, could not legally, being unregistered, take effect as against registered documents relating to the same property. It was also contended that even if the Courts below had the power in this case to grant specific performance of the alleged oral agreement, the

special circumstances of the case did not warrant such an exercise of their discretion.

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Baboo Sreenauth Doss.—This is a case for specific performance. The meaning and intention of the oral agreement of the 13th Assin must be taken to have been, not that the raja-defendant would sign any particular papers, but that he would put the plaintiff in the position of a mokuraridar, and till that has been done, the agreement has not been fully performed. 2. There is no proof that the terms of the oral agreement were reduced into writing. The secondary evidence admitted, was evidence, not of the contents of the two leases, but of the terms of the oral agreement. 3. If the Mondul-defendants have been ill-treated, they, in their turn, can sue the raja-defendant. 4. If the Court below had the power in its discretion to make a decree for specific relief, this Court will not rightly control it in the exercise of such discretion.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J. (who, after stating the facts, continued).—The Rajah and Madhub and Narain Mondul have appealed against the result of the case. It is contended on their behalf that specific performance cannot be decreed, and that the agreement with the plaintiff having been reduced into writing cannot be proved by oral evidence. It is further contended, that the oral agreement cannot prevail against the later registered lease.

Now the plaintiff sues on an oral contract to execute a moku-rari lease, which has never been reduced into writing. It is true that the raja, at first intending to carry out that contract, had the lease drawn up in writing ; but the transaction was not completed by delivery and registration. Therefore, under the circumstances, the objection that parol evidence is not admissible, does not arise ; in fact, it was not seriously pressed on behalf of the appellant.

Taking it then as established, that the raja-defendant entered into an oral agreement to execute a lease in the plaintiff's favour, the next question is, whether specific performance can be enforced. If the case were governed by the Specific Relief Act, we

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should have no hesitation in saying that s. 27 would apply to this case. Madhub and Narain Mondul are clearly, on the finding of the lower Court, transferees under a subsequent title with notice of the original contract to the plaintiff. But although that Act (I of 1877) is not in force in the district of Manbhoom, we may fall back upon the general rules of equity, which are, undoubtedly, in the plaintiff's favour.

It has indeed been argued that, under s. 48 of the Registration Act, the oral agreement with the plaintiff not being accompanied or followed by delivery of possession, cannot be enforced against the registered lease held by Madhub and Narain Mondul. No doubt, the words of that section (48) are positive, and they have been interpreted by Pontifex, J., as meaning "that the only oral alienations of which the law can take notice in competition with registered instruments, are those which are properly established by evidence of possession;" and again "unless the oral alienee was in possession, the Courts would now be excluded from considering any equity which he might have against a subsequent alienee by registered deed"—*Fuzludeen Khan v. Fakir Mahomed Khan* (1). But that case turned upon the construction of s. 50 of the Registration Act, and the issue was between two deeds conveying the same property, one registered and the other not; and Garth, C. J., in his judgment, expressly states, that no question of equity arose; and also that the equitable doctrine of notice might have been applied if it could be shown that the subsequent purchaser had notice of the prior unregistered conveyance.

In this case we have a finding that the alienee under the registered lease had notice of the oral agreement to execute a lease in favour of the plaintiff, and having looked at the evidence, we see that they were present when he paid a portion of the consideration-money.*

It appears to us, that if we adopt the principle that no equity is to be considered where an oral agreement to alienate is not followed by possession, the 27th section of the Specific Relief Act, as illustrated (b), would be rendered a dead letter wherever it applies, when competition arises between an oral agreement to

alienate unaccompanied by possession, and an alienation by registered deed with notice of the previous agreement; but we are not compelled to adopt this conclusion. The subject has been fully considered in the case of *Waman Ramchandra v. Dhondiba Krishnaji* (1), and the judgment of Westropp, C. J., at pp. 146 to 154, discusses the effect of actual notice and the application of the English rules of equity to mofussil cases, and that too in a case to which the Specific Relief Act did not apply, as it does not in these cases before us. It is unnecessary to recapitulate the reasons upon which the judgment of Westropp, C. J., are founded. It is sufficient to say that we follow them, and consider that they apply to these cases.

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The foregoing remarks apply equally to Appeal No. 1595. We therefore dismiss these appeals with costs; but we think that the decree of the Munsif must be amended, for in its present form it will not have the effect that the cases require. We think that it should declare the leases by the raja-defendant to Madhub Mondul and Narain Mondul void as against the plaintiff; and that, on the plaintiff paying Rs. 100 to the raja-defendant, the latter shall execute mokurari pottahs to the plaintiff, receiving from him kabuliats in the terms of the agreement between them.

Appeals dismissed.

Before Mr. Justice Pontifex and Mr. Justice McDonell.

IN THE MATTER OF THE PETITION OF BHOOPENDRA NARAIN ROY.

BHOOPENDRA NARAIN ROY v. GREESH NARAIN ROY

AND ANOTHER.*

1880
Nov. 23.

Application under Act XXXV of 1858—Interference of Court—Ill-treatment of Lunatic—Accounts of Joint Property—Mitakshara.

The husband of a lunatic's daughter applied to the Court to declare his father-in-law, who was a member of a joint Mitakshara family, to be a lunatic, and appoint a manager of his property and guardian of his person under Act XXXV of 1858. The lunatic had an interest both in joint ances-

* Appeal from order, No. 197 of 1880, against the order of A. J. R. Bainbridge, Esq., Judge of Moorshedabad, dated the 7th April 1880.

(1) I. L. R., 4 Bomb., 126.

1880 tral property and in property inherited collaterally, which might, but was not shown to, belong to him separately. The lower Court found that the application was made with a view to taking consequent proceedings for partition. *Held* that, it appearing that he had remained for sixteen years in the same house under the same guardians, and there being no allegation of ill-treatment, no sufficient grounds were shown for the Court's interference, or the appointment of another guardian of his person. Before any action can be taken under the Act in this respect, there ought to be a strong case made out that the change of custody would be for the lunatic's benefit. *Held also*, that as his daughter could not inherit his ancestral property, and as it was doubtful if the collaterally inherited property was the separate property of the lunatic, the Court would not, under such circumstances, appoint a manager of the property: but that the guardians of the lunatic, who were managers of the joint family, should, on her request, furnish accounts to the daughter, of the management of the collaterally inherited property.

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Seemle.—Act XXXV of 1858 applies to the members of a Mitakshara family.

Quere.—Assuming the application to be made with a view to a partition of the property, and that the lunatic was declared a lunatic under the Act, whether a partition could be had?

THE facts material to the report are sufficiently stated in the judgment of the Court (PONTIFEX and McDONELL, JJ.)

Baboo Hem Chunder Banerjee, Baboo Gurudass Banerjee, Baboo Srish Chunder Chowdhry, and Baboo Saroda Prosaud Roy for the petitioner.

Baboo Mohesh Chunder Chowdhry and Baboo Mohiny Mohun Roy for the respondent.

PONTIFEX, J.—The District Judge in this case has refused to grant an application under Act XXXV of 1858 to declare that one Kasinauth Roy is a lunatic, and to appoint a manager of his estate and guardian of his person. The application was made by the husband of the lunatic's daughter. The family is a Mitakshara family, and consequently the daughter would not inherit the interest of her father in the ancestral property. The Judge has found that in reality the application has been made with a view to taking consequent proceedings for partition. Now it appears, according to the statements of the applicant, that there are two qualities of property in which the lunatic

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is interested,—first, ancestral estate, which under the Mitakshara law his daughter would not inherit; and secondly, estate said to have been inherited from collaterals, and to have been inherited, not by the family as a joint family, but by the two senior members of the family at the time the inheritance fell in, to the exclusion of members of the family of a lower degree. It has been objected before us, and apparently the Judge seems to have been of opinion, that Act XXXV of 1858 cannot and does not apply to members of a Mitakshara family. We are unable, as at present advised, to admit that as a correct proposition. It appears to us that there may be cases where it is essentially necessary that a guardian should be appointed for a member of a Mitakshara family as much as for a member of any other family. It is not necessary, however, for us to decide that question, because we think the application fails on other grounds. We agree with the Judge that no sufficient cause has been made out for putting the Act into operation. In the first place, there is no suggestion, and certainly no evidence whatever, as to any ill-treatment of the lunatic. It is not even suggested that he has been improperly taken care of, or that he is not treated in a proper and considerate manner. He has been a lunatic for the space of some sixteen years, and during the whole of that period he has lived with his nephews in this joint family. No allegation is made that he has ever received ill-treatment. It is no doubt true that till quite recently his wife was living in the family and was capable of protecting and taking care of him. But we think that before any action can be taken under this Act, before we should be justified in removing the lunatic, who has been living for the last sixteen years in this house, to some other place and custody, there ought to be a strong case made that it would be for the lunatic's benefit.

Secondly, with respect to the management of the lunatic's property. The persons who are now in the management of the property are his two nephews, sons of deceased brothers. There is some allegation that they have not conducted the management with sufficient care; and indeed extravagance has been imputed from the fact that within the last five years the debt upon the property has materially increased. The only evidence of

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that consists in recitals in the various documents put in, and in an admission made by one of the nephews in his examination. We think that the admission does not go far enough. It was a mere statement that, in consequence of litigation and numerous law-suits to which the family was subjected, the debt was so increased that it was necessary to raise a considerable sum of money. Now, with respect to the supposition of the Judge that these proceedings were taken with the intention of ultimate proceedings for a partition, without deciding whether or not a partition could be had under such circumstances, if the lunatic were declared a lunatic under the Act, it may be not improper to refer to the policy of the Lunacy Enactments in England. Under these Acts, it has always been the policy of the Legislature not to interfere with the course of inheritance of the lunatic's property, and provisions for that purpose have been inserted into these Acts; so that even where it is necessary for payment of debts or otherwise that the lunatic's real property should be sold, it is provided that the surplus monies should be considered as in the same condition as if invested in land, leaving them heritable as if they were land; possibly, therefore, even if an application for partition were made, it might be refused in accordance with that policy.

One difficult question, however, remains, and that is with respect to the property which was inherited from collaterals. It seems to us, that that property, if it vested in the lunatic, might be on a different footing altogether from strictly ancestral property, and that the lunatic might be entitled to a separate share in that property; and if so entitled, his daughter might be his heir, and it might be material that a manager should be appointed for it. But the circumstances relating to that property are as follows:—Before his lunacy, as we must assume, Kasinauth had made a *hiba* of his share of the ancestral property, as also of his share of this collaterally inherited property, to his wife. That *hiba* had been in operation until about the year 1280 (1873), when the High Court held, that so far as it related to ancestral property it was void, and subsequently the wife relinquished her interest under the *hiba* in consideration of the nephews paying her the monthly sum of

Rs. 150. Now, if the *hiba* passed the lunatic's interest in the property inherited from collaterals, then there is nothing before us to show that such interest became revested in the lunatic; and, under these circumstances of doubt, we think we ought not to allow the Act to be put into operation, but that it ought to be left for the natural heir of the lunatic, if so disposed, to institute a suit as next friend of the lunatic to have that matter cleared up. If such a suit is instituted, and if it shall appear that this property is separate property belonging to the lunatic, then, if necessary, a further application might be made under the Act. But we wish to observe that the nephews who now, as members of the joint undivided family, have the custody of the lunatic and are managing the estate, ought, in our opinion, when requested thereto by the daughter of the lunatic as the natural heir, to produce and furnish her with accounts of the management of the property. We think it would be sufficient, if such accounts were produced yearly. If such accounts are refused, or if the lunatic's daughter is refused proper access to him, then a case might perhaps be made, which might influence the Court to interfere under the Act. At present we are of opinion that no sufficient case has been made, but, under the circumstances, we think there ought to be no costs of this application.

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Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Field.

NEWAJ BUNDOPADHYA (DEFENDANT) v. KALI PROSONNO GHOSE
(PLAINTIFF).*

1880.
Dec. 10.

Suit for Enhancement of Rent—Plea that certain of the Lands included in Notice are not enhanceable—Onus of Proof of such Fact—Notice of Enhancement.

In suits for enhancement of rent, where the tenant pleads that a portion of the land sought to be enhanced is held by him rent-free, the onus is on the tenant to prove *prima facie* that such portion of the land is so held by

* Appeal from order, No. 143 of 1880, against the order of H. L. Oliphant, Esq., Judicial Commissioner of Chota Nagpore, dated the 2nd February 1880, reversing the order of Baboo Akhoy Coomar Bose, Deputy Collector of Manbhoom, dated the 5th May 1879.

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him ; and if he be successful in this, the onus is then shifted upon the land-
 lord to rebut such *primâ facie* evidence.

A notice for enhancement, otherwise sufficient, is not invalidated because a
 portion of the lands claimed as enhanceable in such notice turns out to
 be rent-free land ; but is good so far as it is applicable to the portion of the
 land which is liable to enhancement.

ONE Kali Prosonno Ghose, a taluqdar, sued one Ram Sarun
 Banerjee for enhancement of rent.

The defendant pleaded that only $3\frac{1}{2}$ kanis of the land held by
 him were rent-paying ; that a portion of the land was rent-free
 debutter and lakhiraj, and a further portion held at a quit-rent ;
 and that the rate of rent paid by him was the same which had
 been paid for the last 150 years.

The Deputy Collector held, that the onus was on the plaintiff
 to prove that the lands which were claimed as rent-free were
 mal lands ; and further held, that as to the rent-paying lands the
 defendant had failed to prove a uniform rate of payment for
 upwards of twenty years, and that, therefore, such lands were
 liable to enhancement ; but inasmuch as the plaintiff in his notice
 of enhancement made no distinction between mal lands and rent-
 free lands, he held the notice to be illegal, and dismissed the suit.

The plaintiff appealed to the Judicial Commissioner, who
 remanded the case to the lower Court, on the ground that the
 tenant was bound to have given some *primâ facie* proof that a
 portion of the lands held by him was rent-free, and that the
 lower Court should have tried the question as to whether the
 mal lands were liable to enhancement, notwithstanding that the
 notice to enhance included both rent-free and mal lands.

The defendant appealed to the High Court.

Baboo Bama Churn Banerji for the appellant.

Baboo Taruk Nath Dutt for the respondent.

The following judgments were delivered :—

GARTH, C. J.—I think that this appeal should be dismissed.

A suit was brought by the zemindar to enhance the rent of
 certain lands after notice. The defence in respect of one portion

of these lands was, that it was lakhiraj; and the defendant called two witnesses to prove that defence.

The first Court dismissed the suit upon this ground. It held that, as regards the lands said to be lakhiraj, a *prima facie* case had been made out by the defendant that they were lakhiraj; and that the plaintiff had failed to show that the whole of the lands in suit were rent-paying lands; and as the notice of enhancement was a general one applicable to all the lands in suit, not distinguishing the rent-free from the rent-paying lands the notice was bad even for the rent-paying portion; and therefore he dismissed the suit, and declined to go into the question of enhancement at all.

The case then came before the Judicial Commissioner on appeal: and he has remanded it to the first Court upon the grounds;—1st, that as it is admitted that the defendant holds some lands in the plaintiff's zemindari, and pays him an entire rent, he was bound, if he wanted to show that a portion of the lands was rent-free, to have given some *prima facie* proof to that effect, showing what particular lands were rent-free; and as the Judicial Commissioner considered that the evidence offered by the defendant did not make out a *prima facie* case that any lands were lakhiraj, he sent the case back to the Court below to have the question of enhancement tried.

Then, secondly, with regard to the notice, the Judicial Commissioner held, that even if the defendant had succeeded in proving a portion of the lands to be lakhiraj, still there was no reason why the first Court should not have tried the question, whether the mal lands were liable to enhancement, and whether the rent ought to be enhanced.

It has now been contended before us that the learned Judicial Commissioner was wrong upon both these points.

It was argued that, in the case of *Huryhur Mookerjee v. Goomanee Kazee* (1), it was decided by a Full Bench of this Court, that in all cases where a plaintiff brings a suit for enhancement, the onus is upon him to show that the whole of the lands, the rent of which he seeks to enhance, are rent-paying. But that case does not decide anything of the kind. There a certain part of

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(1) *Marshall's Rep.*, 523; S. C., B. L. R., Sup. Vol., 15.

1880 the land, the rent of which the plaintiff sought to enhance, was
 NEWAJ BUN- assumed by the lower Court to be lakhiraj; and what the Court
 DOPADHYA held was, that the validity or invalidity of the defendant's
 v. title to that land could not be tried in that suit. The head-
 KALI note of that case is rather calculated to mislead.
 PRISONNO
 GHOSE.

In another Full Bench case, *Gooroo Persad Roy v. Juggo-bundoo Mozoomdar* (1), it was distinctly held by Sir Barnes Peacock and two other Judges, that, in a suit for a kabuli-
 liat, where the defendant had acknowledged himself to be the
 plaintiff's ryot as to a portion of the lands in suit, the onus was
 on him to prove the defence which he set up, viz., that he was
 not the plaintiff's ryot as to the rest of the land.

Sir Barnes Peacock, in delivering judgment, says:—"We find
 that the defendant admitted that, as to a certain portion of the
 land for the rent of which plaintiff sued, he (defendant) had
 given a kabuli-
 liat, or in other words, had acknowledged that he
 was plaintiff's ryot. With this *prima facie* evidence of the
 fact of defendant being plaintiff's ryot, the burden of proving
 the special plea raised by the defendant of his not being plain-
 tiff's ryot for the rest of the land, was clearly upon the defend-
 ant; otherwise, indeed, every ryot might meet every rent case
 by a false plea of proprietary title."

The same principle appears to have been acted upon in the
 case of *Nehal Chunder Mistree v. Huree Pershad Mundul* (2).
 Mr. Justice Kemp, who delivered judgment in that case, being
 one of the Judges who composed the Full Bench in the above
 case, cited from Marshall's Reports.

And in another case, *Beebee Ashrufoonissa v. Umung Mohun
 Deb Roy* (3), the learned Judges (Seton-Karr and Sumbhoonath
 Pundit, JJ.) held, that "it could never have been the intention of
 the Full Bench that a bare allegation of a defendant of a rent-free
 holding was to bar the plaintiff's claim. The meaning must have
 been that there should be some *prima facie* evidence of an
 ostensible rent-free title in some portion of the land for which
 rent is sought."

It seems to me that these decisions are quite conclusive upon
 the point which we have to decide; and if the question were an

(1) W. R., Sp. No., 15. (2) 5 W. R., 183. (3) 5 W. R., Act X Bul., 48.

open one, I should undoubtedly hold that to be the law; because I think it must be unreasonable, where a zemindar sues a tenant for enhancement, who undoubtedly holds and pays rent for lands within his zemindari, that the mere allegation by the tenant that a portion of those lands is rent-free, should throw the onus upon the landlord of proving what particular portion of the land which the tenant holds is rent-paying. The onus ought to be upon the tenant to prove *prima facie* that some and what part of the land is rent-free; and when he has done so, the onus would then be thrown upon the landlord to rebut such *prima facie* evidence.

Then it is also contended in this case, that the Judicial Commissioner had evidence before him, which he ought to have considered sufficient to establish a *prima facie* case for the defendant. But it was for him to determine whether that evidence was sufficient or not, and I consider it no part of our duty upon this appeal to go into the question of its sufficiency.

Then, with regard to the notice, I am clearly of opinion that the Judicial Commissioner was right. Suppose a suit brought to enhance the rent of 100 bighas of land, and a notice given setting out the grounds of enhancement, surely the notice would not be altogether bad because the defendant might prove that of those 100 bighas he holds 10 bighas rent-free. The notice would be perfectly good, so far as it was applicable to the remaining 90 bighas.

The appeal will, therefore, be dismissed with costs.

FIELD, J.—I also am of opinion that the Judicial Commissioner rightly laid the burden of proving a *prima facie* case of lakhiraj holding upon the defendant ryot, and I think that it is impossible to say that the evidence of the two witnesses examined amounted to sufficient proof of such a *prima facie* case.

Appeal dismissed.

1880

NEWAJ BUN-
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PROSONNO
GHOSH.

Before Mr. Justice Pontifex and Mr. Justice McDonell.

1880
Dec. 10.

ANUNDA SHAHA BISWAS, *alias* NYOMUDDIN SHA BISWAS,
AND OTHERS (JUDGMENT-DEBTORS) *v.* KEMA BEBEE AND OTHERS
(DECREE-HOLDERS).*

*Appeal, Ex parte—Application for Rehearing—Civil Procedure Code
(Act X of 1877), s. 560.*

An applicant, presenting a petition for the rehearing of an appeal decided *ex parte*, must, at the time of making such application, be prepared to satisfy the Court, that the notice of appeal was not duly served upon him, or that he was prevented by sufficient cause from attending when the appeal was called on for hearing.

IN this case the plaintiff having obtained a decree, the defendants appealed, the appeal was heard *ex parte*, and the decree of the Court of first instance modified to some extent. Subsequently the plaintiff presented a petition, applying for the rehearing of the appeal, under s. 560 of the Code of Civil Procedure. This application was rejected summarily. Thereupon the plaintiff appealed to the High Court, on the ground that his application for a rehearing should not have been summarily rejected, but that an opportunity should have been afforded him to prove the allegations contained in his petition.

Baboo Shoshee Bhoosun Dutt for the appellants.

Baboo Mohiny Mohun Roy and *Baboo Lal Mohun Das* for the respondents.

The judgment of the Court (PONTIFEX and McDONELL, JJ.) was delivered by

PONTIFEX, J.—We think that, under s. 560 of the Code of Civil Procedure, when a petition is presented for rehearing of an appeal heard *ex parte* in the absence of the respondent, the applicant is bound to satisfy the Court that the notice was not duly served, or that he was prevented by sufficient cause from

* Appeal from order, No. 196 of 1880, against the decree of P. Dickens, Esq., Judge of Nuddea, dated the 1st April 1880.

attending when the appeal was called on for hearing. If he is not prepared at the time to satisfy the Court in these particulars, his application is properly rejected. That is what seems to have happened in this case. The appeal is dismissed with costs.

1880

ANUNDA
SHAH
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v.
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BEBER.

Appeal dismissed.

Before Mr. Justice Mitter and Mr. Justice Maclean.

RAM DUTT SINGH (DEFENDANT) v. HORAKH NARAIN SINGH
(PLAINTIFF).*

1880

Dec. 18.

Limitation Act (XV of 1877), sched. ii, arts. 99, 132—Suit for Share of Government Revenue, and for Declaration that Estate is charged with amount.

A suit for recovery of Government revenue, which the defendant was bound to pay, but which has been paid by the plaintiff to save the whole estate from sale, where the plaintiff asks to have the amount so paid made a charge on the portion for which he paid it, is governed by art. 132, and not by art. 99 of Act XV of 1877.

THE plaintiff in this case sued for Rs. 439-6, being the Government revenue paid by him for a mouza called Mouza Tulsipore, from 13th September 1866 to 8th August 1878, on account of the defendant. Mouza Tulsipore was a portion of the talook of Beharpore Agarsanda, which was held by the defendant, the remaining portion being held under a ticca lease and a conditional deed of sale by the plaintiff. The portion of the Government revenue due for Mouza Tulsipore for the above period not having been paid by the defendant, the plaintiff was compelled to pay it in order to save his own portion from sale for the arrears.

The plaintiff prayed for a decree for the above sum with interest, and that it might be recovered by the sale of Mouza Tulsipore, and for a declaration that the said sum was a charge

* Appeal from Appellate Decree, No. 1028 of 1879, against the decree of A. V. Palmer, Esq., Judge of Shahabad, dated the 25th February 1879, affirming the decree of Baboo Lal Gopal Sen, Second Munsif of Arra, dated the 24th September 1878.

1880 on Mouza Tulsipore. The defendant contended (*inter alia*)
 RAM DUTT SINGH v. HORAKH NARAIN SINGH. that the suit was barred by limitation under art. 99, Act XV of 1877.

The Munsif held that art. 132, and not art. 99, of Act XV of 1877 was applicable, and gave the plaintiff a decree.

The Judge on appeal upheld that decree, and dismissed the appeal.

The defendant thereupon appealed to the High Court.

Baboo *Doorga Pershad* for the appellant.

Baboo *Pran Nath Pundit* for the respondent.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J.—This is a suit to recover Rs. 439-6, being money paid by the plaintiff, between September 1866 and August 1878, as revenue of Mouza Tulsipore, belonging to defendant, with interest thereon. The plaintiff held the other mouzas of the defendant's estate under baibilwafa and lease, by the conditions of which he was to pay the revenue of them, there being no obligation on him to pay the revenue of Tulsipore. But his allegation is, that the defendant neglected to pay the revenue of Tulsipore, and that he, the plaintiff, was, therefore, compelled to do so.

The defence was, first, that, by art. 99, sched. ii, Act XV, 1877, the plaintiff's suit was wholly barred; second, that the plaintiff paid the revenue of Tulsipore by arrangement, receiving a corresponding reduction of his rent. This last plea was decided against the defendant in both the lower Courts, and although allusion is made to it in the last ground of appeal, it has not been mooted before us. Both the lower Courts have held that art. 132, and not art. 99, sched. ii, applies on the authority of *Enayet Hossein v. Muddun Moonee Shahoon* (1) and *Deo Nandan Ojha v. Musst. Dulhun Bisnath Koer* (2). Before us it is again urged, that art. 99 applies, that art. 132 does not, and

(1) 14 B. L. R., 155; S. C., 22 W. R., 411.

(2) Sp. Ap., No. 1913 of 1876, unreported.

that the plaintiff is not entitled to interest and to a declaration of lien on the mouza.

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RAM DUTT
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We think art. 99 has no application to the case, the plaintiff having paid the money, neither under a decree nor as a joint proprietor of the estate. The plaintiff is undoubtedly entitled to recover the money under s. 9, of Act XI of 1859, and he might also, under that section, have retained his lien on the other mouzas of the estate till his money had been paid. He is equally entitled to recover his money under s. 69 of the Contract Act, and we think that the liability to pay the revenue was not merely a personal liability of the defendant, but was also a liability imposed upon the defendant's estate.—*Mothooranath Chuttopadhya v. Kristo Kumar Ghose* (1).

As regards the period of limitation, we are unable to distinguish the case from *Deo Nandan Ojha v. Musst. Dulhun Bisnath Koor* (2); and we, therefore, concur in thinking that art. 132 applies. We see no reason why the plaintiff should not recover interest on the money, nor do we object to his obtaining a declaration that the money is recoverable by sale of Mouza Tulsipore, though it would have been better if he had asked for recovery by sale of the entire estate.

The appeal will, therefore, be dismissed with costs.

Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Field.

RAMTONU ACHARJEE v. PEARYMOHUN ACHARJEE.*

1880
Dec. 21.

Suit in Small Cause Court—Accounts—Want of Jurisdiction.

A, B, and C, the joint owners of an estate, sued their tenant in the Munsif's Court for rent; the tenant defeated the suit by proving payment of the entire rent to *B*.

A then brought a suit in the Small Cause Court against *B* for damages equal in amount to the one-third of rent due to him and the costs incurred by

* Rule No. 1044 of 1880, against the order of J. Weston, Esq., Judge of Small Cause Court at Narail, dated the 5th June 1880.

(1) I. L. R., 4 Calc., 369.

(2) Sp. Ap., No. 1913 of 1876, unreported.

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 MOHUN
 ACHARJEE.

him and awarded against him in the rent-suit in the Munsif's Court. *B* pleaded that he had expended the share of rent due to *A* for the benefit of the joint estate, and that *A* had collected the rents of other mehals belonging to the joint estate, and had not accounted for such rents. *Held*, that the suit being one which involved questions of partnership account between the joint proprietors of an undivided estate, could not be entertained in a Court of Small Causes.

THIS was a rule to set aside a judgment of a Small Cause Court for want of jurisdiction.

The facts of the case were as follows :

One Pearymohun Acharjee, Ramtonu Acharjee, and a third person, being co-proprietors of a certain estate, sued their tenant in the Munsif's Court for rent. The tenant pleaded payment of the entire rent to Ramtonu Acharjee, who at the hearing admitted the same, and the suit was dismissed.

Pearymohun Acharjee then brought a suit in the Small Cause Court against Ramtonu Acharjee, to recover Rs. 14-4-1 as damages, made up from the following items: one-third of the rent due to him, the costs incurred by the plaintiff in the rent-suit, and the costs awarded against the plaintiff in the rent-suit in favor of the tenant-defendant in that suit.

The defendant Ramtonu Acharjee contended, that the Small Cause Court had no jurisdiction to entertain the suit, the suit being one virtually for an account of a partnership proceeding, inasmuch as he had expended sums out of the moneys collected as rent, for the benefit of his co-proprietors; and further that the plaintiff in the present suit had also collected the rents of other mehals belonging to the joint estate, and that he had not adjusted accounts although requested to do so. The Small Cause Court gave the plaintiff a decree for a portion of the amount claimed.

The defendant then applied to the High Court, and obtained a rule, calling upon the plaintiff to show cause why the decree of the Small Cause Court should not be set aside for want of jurisdiction.

Baboo *Bungshi Dhur Sen* in support of the rule.

Baboo *Grija Sunkar Mozoomdar* showed cause.

The judgment of the Court (GARTH, C.J., and FIELD, J.) was delivered by

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GARTH, C. J. — I think that this rule should be made absolute. It was obtained on the ground that the Small Cause Court had no jurisdiction to try the suit.

The facts were these: the plaintiff and defendant and a third person, being co-proprietors of certain lands, the plaintiff brought this suit to recover his share of the rent of a portion of those lands, which the defendant had received from the ryot.

The answer of the defendant was this, that he and the plaintiff and a third person, being co-proprietors of the lands, the defendant had, with the plaintiff's consent, received the rent not only of this particular jote, but of several other jotes; and that he had disbursed that money in various ways for the benefit of the three co-proprietors.

Under these circumstances it was contended, and it seems to me rightly contended, that it was impossible to try the case, so as to do justice to all parties concerned, except by taking an account. The sums which the defendant had disbursed could not properly be set off against the claim in this suit, and it would obviously be unjust to the defendant to allow the plaintiff to recover the share of the rent which he was asking for, and yet not to allow the defendant to set off against the plaintiff's claim the sums which he paid for the benefit of the plaintiff and other proprietors.

The suit was clearly one which involved questions of partnership account between the joint proprietors of an undivided estate; and therefore the Small Cause Court had no jurisdiction to try it.

Our attention has been called to the case of *Ram Coomar Chowdry v. Shama Churn Chowdry* (1), in which the facts were substantially the same as those in the present case; and it was held, for the reason which I have just explained, that the Small Cause Court had no jurisdiction to try the suit. There is also another case, *Kandaree Joardar v. Mannik Joardar* (2), to which our attention has also been called. There it appears

(1) *Suth., S. C. C. Ref., 33.*(2) *Id., 23.*

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that one co-proprietor brought a suit against another co-proprietor for a portion of the produce of certain land which belonged to them both; and the Judges seem to have thought that case distinguishable from the general rule which is laid down in the other case at page 33. I confess I feel some difficulty in recognizing the distinction. It seems to me that, under such circumstances, no suit could, with justice, be disposed of in the Small Cause Court.

I am of opinion, therefore, that this rule should be made absolute with costs.

Rule absolute.

Before Mr. Justice McDonell and Mr. Justice Broughton.

1880
 Dec. 22.

KADUMBINI DABYA (JUDGMENT-DEBTOR) v. KOYLASH CHUNDER PAL CHOWDHRY (DECREE-HOLDER).*

Beng. Act VIII of 1869, s. 58—Limitation—Execution of Decree—Delay and Laches—Costs.

In a suit for arrears of rent under Beng. Act VIII of 1869, a decree was obtained, on the 30th June 1876, for a sum which with costs amounted to less than Rs. 500. Application for execution was made, in December 1877, against property other than that for which the rent was due; but was, in the first Court, opposed successfully by the judgment-debtor, on the ground that the undertenure should first be proceeded against, though such undertenure had already been sold away in execution of another decree, and the execution-proceeding was struck off on the 15th March 1878, and the property released from attachment. The judgment-creditor appealed, and was successful both in the lower Appellate Court and the High Court, the latter decision being dated 26th February 1879. The costs awarded him in these proceedings, if added to the amount of the decree, would amount to a sum of more than Rs. 500. The next application for execution was made on 19th August 1879.

Held, that the costs of the appeals in the execution-proceedings should not be added to the decree; and, therefore, the decree being for less than Rs. 500, the provisions of s. 58, Beng. Act VIII of 1869, applied to it.

Held also, that the attachment having been removed in March 1878, the execution of the decree was barred under that section.

* Appeal from order, No. 262 of 1880, against the order of P. Dickens, Esq., Judge of Nuddea, dated the 8th July 1880, affirming the order of Baboo Rajendro Coomar Bose, Munsif of Ranaghaut, dated the 15th April 1880.

The question of due diligence on the part of a judgment-creditor can be gone into on a second appeal.

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THE respondent obtained a decree under Beng. Act VIII of 1869 for arrears of rent against the appellant. The decree was for Rs. 375 and costs, in all about Rs. 435, and was dated the 30th June 1876. In execution of that decree, an application was made on the 21st December 1877 by the decree-holder for the sale of certain property belonging to his judgment-debtor other than the undertenure on account of which the arrears of rent were due, such undertenure having been previously sold away in execution of another decree against the debtor.

The judgment-debtor opposed the application, on the ground that execution ought to proceed in the first instance against the undertenure from which rent was due. This objection was allowed on the 13th March 1878. The decree-holder appealed, and the Judge reversed the decision; and the Judge's decision was upheld by the High Court on appeal on the 26th February 1879. When the Court of first instance allowed the objection it released the property from attachment, and directed the decree-holder to proceed within two days against the undertenure; this he did not do, and consequently the whole proceeding in execution was struck off on the 15th March 1878.

The next application for execution was made on the 19th August 1879, after which there appeared to have been some delay, and a further application was made on the 20th January 1880. It was contended that the application was barred under s. 58, Beng. Act VIII of 1869, more than three years having elapsed from the date of the decree.

The Munsif held that it was not barred, as it was in substance an application to continue the proceedings already set on foot by the former application, referring to *Issuree Dassee v. Abdool Khalak* (1) and *Paras Ram v. Gardner* (2); and the interruption to the execution was not occasioned by any fault or laches of the decree-holder, but by the frivolous objection of the judgment-debtor. He held further, that, in calculating whether a judgment exceeds Rs. 500, all costs, whether incurred

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before or after the decree, must be taken into consideration, referring to the case of *Campbell v. Hug* (1); and that, at the time when the application was made, the amount payable to the decree-holder, inclusive of costs, exceeded Rs. 500, and therefore the application for execution did not fall within s. 58 of Beng. Act VIII of 1869, but was governed by the ordinary law of limitation.

The Judge on appeal affirmed this decision.

The judgment-debtor appealed to the High Court.

Baboo *Hurry Mohun Chuckerbutty* for the appellant.

Baboo *Rash Behary Ghose* for the respondent.

The judgment of the Court (McDONELL and BROUGHTON, JJ.) was delivered by

BROUGHTON, J.—The question in this case arises on the construction of s. 58 of Beng. Act VIII of 1869, which enacts as follows:—

“No process of execution of any description whatsoever shall be issued on a judgment in any suit for any of the causes of action mentioned in ss. 27, 28, 29, or 30 of this Act, after the lapse of three years from the date of *such judgment*, unless the judgment be for a sum exceeding Rs. 500, in which case the period within which execution may be had shall be regulated by the general rules in force in respect to the period allowed for the execution of decrees of the Court.”

(After stating the facts, the learned Judge continued):—

There is some confusion in the case owing to the judgment of the Court of first instance deciding the case with reference to the application of the 19th August 1879, although the case (which is called No. 35 of 1880) apparently refers to the application of January 1880. This is, however, immaterial, because if the application of August 1879 was out of time, so was that of January 1880.

It is contended on behalf of the respondent that these applications were a continuation of the applications of 1877, and that the only question in the case is, whether the respondent acted

with reasonable diligence in applying for the renewal of the already existing process in execution; and this, it is said, is a question of fact which cannot be dealt with in a second appeal.

In support of the first branch of this argument, two cases decided by Mr. Justice Ainslie and myself were cited.

In the first case—*Deodhary Singh v. Kunwar Dowlut Ram* (1)—the application for execution was within time, but it took a few days for the Court to obtain the records, and they were not received until after the time had expired. That case was therefore analogous to the case of *Hera Loll Seal v. Poran Matteah* (2), decided by Sir Barnes Peacock, C. J., and Markby, J., and was decided accordingly.

In the other case—*Golami Sahu v. Chutterbhooj Patuck* (3)—the application for execution was made on the 10th of October 1871, and on the 24th of February 1872, the creditor applied that the case should be taken off the file for the present, but that the attachment which had issued should be kept in force. His next application was made on the 8th February 1875, and it was held that it was within three years.

In both of these cases, therefore, the attachment was subsisting; in the present case it had been withdrawn on the 13th of March, and the execution-proceedings had also been struck off on the 15th. The second of the cases cited was not a case under this special provision of the Rent Law, but an ordinary case of execution of a decree, and the three years ran, not from the date of the decree, but from the date of the last application to enforce it.

In the course of the argument in the case of *Deodhary Singh* (4), two cases were cited, which have been cited again in the present case—namely, *Rhidoy Krishna Ghose v. Kailas Chandra Bose* (5) and *Lalla Ram Sahoy v. Dodraj Mahto* (6). In the former of these two cases the Full Bench by a majority gave a wide interpretation to the expression “shall be issued,” but even in this case the applicant lost no time in applying for a sale of

(1) 3 C. L. R., 189.

(4) 3 C. L. R., 189.

(2) 6 W. R., Act X Rul., 84.

(5) 4 B. L. R., F. B., 82; S. C., 13

(3) 3 C. L. R., 261.

W. R., F. B., 4.

(6) 20 W. R., 395.

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the property as soon as the orders of the Court of the 24-Parganas staying the execution-proceedings of the Revenue Court ceased to be operative. That case, therefore, is not an authority for the validity of the execution in the present case, where there has been considerable delay. The case of *Lalla Ram Sahoy* (1) is more in point, but in this case the execution was made within time, and an order was made for the sale of the property to take place on the 21st of November 1871, the decree being dated the 3rd of September 1868. On consent of the parties, and on a petition of the judgment-debtor dated the 18th of November 1871, the sale was stayed for two months; this period expired in February 1872, but the judgment-creditor waited until April 1872, when it was held that his application came too late. Here also the attachment was not removed although the sale was stayed. *A fortiori* the application in the present case was out of time.

This precedent also disposes of the objections that the question of due diligence cannot be gone into on a second appeal, for it was a case of a second appeal; and indeed no question of fact is involved in these cases; the facts are found; the only question is, whether on these facts the creditors can be considered to have used due diligence.

A further objection has been raised in this case on behalf of the creditor. He contends that the judgment cannot be held to come within the meaning of s. 58 of the Rent Law, because the costs of the appeals from the first order of the lower Court ought to be added to the amount of the judgment. The case of *Campbell v. Huq* (2) was cited in support of this argument. In that case it was held that the costs of, and incidental to, the execution ought to be added. This conclusion was arrived at by applying to the case the definition of costs to be found in s. 188 of Act VIII of 1859, now repealed. The interpretation was a wide one, but it did not go so far as is contended in the present case, but only so far as to add the costs of stamps, &c., in the execution-proceedings. The 188th section could not have been read to include the costs of appeal in the costs of the original suit spoken of in s. 187, for such costs are in the discretion of

(1) 20 W. R., 395.

(2) 6 W. R., Act X Rul., 8.

the Appellate Court, and not of the Court which passed the original judgment.

On these grounds, I think that the execution in the present case was barred by lapse of time, and that the appellant, judgment-debtor, is entitled to succeed.

Appeal allowed.

Before Mr. Justice McDonell and Mr. Justice Broughton.

RADHANATH KUNDU (DEFENDANT) v. LAND MORTGAGE BANK OF INDIA, LIMITED, AND OTHERS (PLAINTIFFS).*

1880
Dec. 22.

Res judicata—Civil Procedure Code (Act VIII of 1859), ss. 2 and 7—Relinquishment—Suit to set aside Order releasing from Attachment Properties as to which a former Suit has been dismissed—Mortgage made during infructuous Attachment—Subsequent Attachment and Sale.

R, on the 30th December 1870, obtained an *ex parte* decree against *D*, in execution of which he attached properties *X* and *Y* on the 4th January 1871.

D applied for a rehearing, which was granted; and on the 30th of December 1871, a decree was again passed against *D*, in execution of which the same properties were attached on the 9th of August 1872, and purchased at the execution-sale on the 1st August 1874 by *R*. On the 14th February 1871, *D* had executed a solehnama and mortgage in favor of *G*, pledging among other properties *X* and *Y* as security for a loan made to him by *G*. *D* having made default in payment, *G* obtained a decree against him in terms of the solehnama on the 28th February 1871. Subsequently, *D* granted another mortgage of the same properties in favor of *G*. *G* sold his decree and mortgage to the plaintiff, who in execution of the decree attached properties *X* and *Y*. In these execution-proceedings *R* brought forward the fact of his purchase of the same properties in August 1874, and his claim was allowed, and the properties *X* and *Y* released from attachment on the 4th March 1876. The plaintiffs had, on the 8th March 1872, obtained a mortgage from *D*, on which they had obtained a decree on the 28th September 1874, in execution of which they had attached *X* and *Y*; but on *R* claiming them under his purchase in August 1874, an order was made on the 10th April 1875 releasing *X* and *Y* from attachment; and in a suit by the plaintiff to set aside that order, they failed as to properties *X* and *Y*, on the ground that those properties were not included in the mortgage of March 1872. In a subsequent suit brought by the

* Appeals from Appellate Decree, No. 1523 of 1879, against the decree of Alfred C. Brett, Esq., Judge of Jessore, dated the 23rd April 1879, affirming the decree of Baboo Kedaressur Roy, Subordinate Judge of that district, dated the 29th March 1878.

1880 plaintiffs against *R* and *D*, to set aside the order of the 4th March 1876, and to
RADHANATH have *X* and *Y* declared liable to be sold under the decree of the 28th February
KUNDU 1871,—*Held*, that the suit was not barred under s. 2 of Act VIII of 1859
v. by the decree in the previous suit, nor was it barred by s. 7 of the same Act.
LAND MORT- *Held* also, that the purchase by *R* in August 1874 was subject to the mort-
GAGE BANK gage to *G* of the 14th February 1871.
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THIS was a suit to set aside an order dated March 4th, 1876, releasing from attachment certain properties, Shearbur and Pursheabur, in Jessore and Furrirdpore, and for an order declaring the plaintiffs entitled to have the said properties sold in execution of a decree held by them against Doorgachurn Shaha, the second defendant.

The facts of the case were,—that Radhanath Kundu, the first defendant, on the 30th December 1870, obtained an *ex parte* decree against Doorgachurn, and in execution of that decree attached the abovenamed properties on the 4th January 1871. An application by Doorgachurn under s. 119 of Act VIII of 1859 for a re-hearing was granted on the 30th March 1871, and on the re-hearing, a decree in a modified form was passed against Doorgachurn on the 30th December 1871. In execution of this decree the same properties were again attached on the 9th of August 1872; and on the 1st of August 1874, they were put up for sale and purchased by Radhanath, the decree-holder. Doorgachurn had previously, on the 14th February 1871, executed a solehnama and a mortgage in favour of one Gouri Prosad Kundu, pledging among other properties the villages of Shearbur and Pursheabur as security for a loan made to him by Gouri Prosad. Doorgachurn having made default in payment, Gouri Prosad obtained a decree on the solehnama on the 28th February 1871. Subsequently, Doorgachurn executed another mortgage of the same properties in favor of Gouri Prosad. Gouri Prosad sold this decree and mortgage to the plaintiff Bank on the 11th of January 1875, the purchase being made in the name of the second plaintiff, Hurichurn Bose, a subordinate in the employ of the Bank, and his name was substituted for Gouri Prosad's in the execution-proceedings.

In execution of the purchased decree, the plaintiff Bank attached the same properties, but Radhanath Kundu intervened,

and objected that he had purchased the said properties at the auction-sale on the 1st August 1874, and his objection was allowed, and the properties released from attachment.

The Bank, therefore, instituted this suit, called in the judgment No. 16 of 1877, on the 3rd March 1877, to have that order set aside, and to establish their right under the decree of the 28th February 1871, and the mortgage which they had purchased from Gouri Prosad.

It appeared that the second defendant Doorgachurn had executed, in favor of the plaintiff Bank, on the 8th March 1872, a mortgage, in a suit on which, they, on the 28th September 1874, obtained a decree, in execution of which they attached Shearbur and Pursheabur, the properties now sought to be proceeded against. In those execution-proceedings the defendant Radhanath Kundu, putting forward his purchase on the 1st August 1874, obtained an order releasing those properties from attachment on the 10th of April 1875. The plaintiff Bank, thereupon, brought a suit, called in the judgment, No. 39 of 1876, to set aside the order of the 10th April 1875. That suit was partly successful, but failed as regarded the properties Shearbur and Pursheabur, on the ground that those villages were not included in the mortgage of the 8th March 1872.

One of the contentions raised by the defendant Radhanath, who alone appeared to defend the suit, was, that the present suit was barred by the former suit, 39 of 1876, under ss. 2 and 7 of Act VIII of 1859.

The Subordinate Judge, on this ground, among others, gave the plaintiffs a decree.

The Judge, on an appeal by Radhanath Kundu, held, that the purchase of Radhanath Kundu of the 1st August 1874 was subject to the mortgage of the 14th February 1871, referring to the case of *Puddomonee Dossee v. Roy Muthooranath Chowdhry* (1); and that the suit was not barred under ss. 2 and 7 of Act VIII of 1859.

From this decision the defendant Radhanath appealed to the High Court.

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1880 Baboo *Grija Sunher Mozoomdar* for the appellant.

RADHANATH KUNDU . Baboo *Bussunt Coomar Bose* for the respondents.

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LIMITED. The judgment of the Court (McDONELL and BROUGHTON,
JJ.) was delivered by

McDONELL, J. (who, after stating the facts, continued):—
The objections which are put forward in this second appeal on behalf of Radhanath Kundu are two—

1st.—That the Bank has already failed in a suit on another mortgage relating to the same property, and that as the right they now claim was then in existence, they ought to have included it in the other suit, and not having done so are barred under Act VIII of 1859, s. 7.

2nd.—That this defendant has priority under his purchase of 1st August 1874.

With regard to the first objection, it appears that the Land Mortgage Bank had obtained a decree against Doorgachurn Shaha on another mortgage, in execution of which decree the same property was put up to sale.

Radhanath Kundu objected to the sale, on the ground that he had purchased the property on the 1st August 1874, and on the 10th April 1875 his objection was allowed. Thereupon the Land Mortgage Bank, on the 30th of June 1876, filed a suit, which was numbered No. 39 of 1876, against Radhanath Kundu and Doorgachurn Shaha; they succeeded in this suit only partially; they failed with regard to the property now in dispute.

This suit, No. 16 of 1877, was instituted when Act VIII of 1859 was in operation, and consequently expl. 4 of s. 13 of the present Code does not directly apply to it. But it is argued that that explanation merely expresses in a few words the result of the decisions upon s. 2 of Act VIII of 1859, which are to be found in the reports of Indian Appeals: the cases of *Katama Natchiar* (1) and *Woomatara Debia v. Unnopoorina Dassee* (2). These decisions were discussed in the case of *Denobundhoo Chowdhry v. Kristomonee Dossee* (3) by a Full Bench, the majority of which held that two suits for possession of the same

(1) 11 Moore's I. A., 50.

(2) 11 B. L. R., 158.

(3) I. L. R., 2 Calc., 162.

land could not be brought, although the title set up in the first suit was not the title set up in the second. The principle, followed in *Bemolasoondury Chowdhraïn v. Panchanun Chowdhry* (1), thus laid down, has been since applied to suits to recover a specific sum of money : *Bheeka Lall v. Bhuggoo Lall* (2).

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But the suit No. 39 of 1876 was a suit brought with the object of having the property sold in execution of one decree after an order had been made on the 10th of April 1875 releasing the property under s. 246 of Act VIII of 1859 on the claim of Radhanath Kundu. The present suit, No. 16 of 1877, is a suit brought with the object of having the property sold in execution of another decree after another order had been made in separate proceedings in execution on the 4th of March 1876 under the same section. The property to be sold is indeed the same, but in no other respect is there any identity between the suits ; and we are of opinion that even the very strict interpretation put upon the decisions of the Judicial Committee by the Full Bench of this Court in the case of *Denobhundho Chowdhry* (3) does not make the principle laid down applicable to this case, so that s. 2 of Act VIII of 1859 does not, in our view of the case, bar this suit ; nor do we think that it was incumbent upon the plaintiff to include both claims in one suit under s. 7.

We are also of opinion that the lower Court rightly held that the purchase by the defendant in 1874 was a purchase subject to the mortgage of the 14th of February 1871. The property had been attached indeed prior to that mortgage, and if the defendant had purchased under that attachment, the case would have been different. But the *ex parte* decree under which the property was first attached had been set aside, not only had the decree been set aside but the attachment had been withdrawn. It was under a subsequent attachment under a subsequent decree, that the defendant purchased, and he cannot set up his purchase as against the earlier encumbrance of the 14th of February 1871.

We think, therefore, that the appeal must be dismissed with costs.

Appeal dismissed.

(1) I. L. R., 3 Calc., 705.

(2) *Id.*, 23.

(3) I. L. R., 2 Calc., 152.

Before Mr. Justice McDonell and Mr. Justice Broughton.

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AND ANOTHER (DEFENDANTS).*

Limitation—Suit by Mortgagee for Possession after Foreclosure—Limitation Act (IX of 1871), sched. ii, arts. 135, 145.

In a suit by a mortgagee to obtain possession after foreclosure instituted more than twelve years after such mortgagee had, upon default, become, under the words of the deed, entitled to possession, but within twelve years of the date of the expiry of the year of grace granted under the foreclosure proceedings, *Held*, under s. 145 of the Limitation Act, IX of 1871, that the period of limitation must be calculated from the date of the expiry of the year of grace, and not from the time when the default was first made.

THIS was a suit for possession of certain property after foreclosure. The plaint *inter alia* stated, that the plaintiff had, upon a mortgage-bond dated the 11th June 1858, lent the first defendant the sum of Rs. 1,301, upon the security of the property, the subject of the present suit; that default having been made on the 12th June of the following year, the plaintiff applied, under Reg. XVII of 1806, for foreclosure; and that an order was made by the Court, in October 1866, to foreclose the said mortgage upon expiry of the year of grace in the October following. The present suit was instituted on the 10th April 1878. The second defendant was a purchaser from the mortgagor after foreclosure. The defence was, that the mortgage-bond contained an express provision that, immediately after the expiration of the date within which it was stipulated that the money should be repaid, the right and possession of the mortgagor should cease to exist; that such right and possession had absolutely terminated on the day of default, the 12th June 1859; that the continuance of such possession by the mortgagor after that period, and subsequently by the second defendant, must be taken to have been a possession adverse to

* Appeal from Appellate Decree, No. 1859 of 1879, against the decree of Alfred C. Brett, Esq., Judge of Jessore, dated the 14th May 1879, confirming the decree of Baboo Kedaressur Roy, Roy Bahadur, Subordinate Judge of that District, dated the 5th August 1878.

the plaintiff's right; and the present suit not having been instituted within twelve years of the date of default, was therefore barred by limitation.

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The Court of first instance dismissed the plaintiff's suit, on the ground that the period of limitation must be taken to have begun to run on the date of default, the 12th June 1859. The lower Appellate Court concurring in this view dismissed the appeal.

The plaintiff thereupon appealed to the High Court.

Baboo Rashbehary Ghose for the appellant.

Dr. Gurudas Banerjee and *Baboo Jogesh Chunder Roy* for the respondents.

The Court (McDONELL and BROUGHTON, JJ.) delivered the following judgments:—

BROUGHTON, J.—This second appeal arises out of a suit for possession after foreclosure of a mortgage of a taluq, to which the defendants plead limitation. The mortgage is dated the 30th of Jeyt 1265, corresponding with the 11th June 1858; default was made on the 30th of Jeyt 1266, or 12th of June 1859. An application under Reg. XVII of 1806 was made to foreclose the mortgage in Assin 1273 (Sept.-Oct. 1866); and the year of grace expired in Assin 1274 (Sept.-Oct. 1867).

The present suit was instituted in 1284, on the 10th of April 1878. And the question is, whether the date from which the period of limitation counts was to run from the 30th of Jeyt 1266, the date of default, or from Assin 1274, when the year of grace expired.

The new Limitation Act, XV of 1877, came into operation before the suit was filed; but the Courts below have applied Act IX of 1871, which differs materially from Act XV of 1877, on the ground that the right to sue was barred before the Act of 1877 came into operation; and it is admitted that if the right was barred by Act IX of 1871, sched. ii, art. 135, it cannot be revived.

The mortgage-deed provided that if the mortgagor did not pay the debt on the 30th of Jeyt 1266, the mortgagee, "will

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become the owner by purchase, and entitled to possession." It is admitted that, if the plaintiff had sued for possession as mortgagee, he would have been bound to file his plaint within twelve years from the 30th of Jeyt 1266; but it is contended that a different view must be taken of a suit like the present, after the termination of foreclosure proceedings, which is not, like the other suit, a suit by a "mortgagee" within the meaning of the words of art. 135 of Act IX of 1871, but is a suit by a mortgagee who has foreclosed and who has become absolute owner; and a case decided on the 6th of last May has been quoted by Baboo Rashbehary, who has appeared for the plaintiff. In that case—*Ghinaram Dobey v. Ram Monaruth Ram Dobey*, Second Appeal No. 126 of 1879, the point raised in the present appeal appears to have been very fully argued, and the judgment (1) which was delivered by Mr. Justice Pontifex

(1) The judgment of the Court (PONTIFEX and McDONELL, JJ.) in the case referred to was as follows:

PONTIFEX, J.—This is a suit for possession after foreclosure. The mortgage was effected by an instrument, under which the money was made payable at a particular time; in default of payment at that time, the deed declared, that the mortgagee should become the owner, as if it had been a deed of absolute sale; and that he should be entitled to possession as if there had been a foreclosure. The suit has been brought more than twelve years after that date, and the defence is, that the plaintiff is barred by art. 135 of the Limitation Act of 1871, which is peculiar in its terms. It gives a period of twelve years from the time that the mortgagee is first entitled to possession. That is the period given to the mortgagee to obtain possession. No doubt, this was a very unfortunate provision in the Act of 1871, and it has been corrected in the Act of 1877. But in suits under the former Act, we are bound to decide in accordance with its provisions and language. If

therefore, no proceeding has been taken by the mortgagee within twelve years to alter his position, the plaintiff's suit would be barred; but in this case, during the twelve years and within about four years after the mortgagee became entitled to take possession, he commenced foreclosure proceedings, and after the year of grace he has sued within twelve years. Now it cannot be said, we think, after taking such proceedings, that he was only entitled to the time allowed by art. 135 of the Limitation Act as mortgagee. The very fact of his taking foreclosure proceedings changes his interest as mortgagee to that of absolute owner, and as he has brought his suit within twelve years from the date of such change of character, we think he is no longer bound by that article. By art. 145 he would be entitled to sue within twelve years after possession became adverse against him. It cannot, we think, be said that, as long as the relation of mortgagor and mortgagee subsisted, the possession of the mortgagor could be adverse to the mortgagee.

was directly in favor of the contention of the present appellant. The two cases in fact are exactly similar. The mortgage-deed was in the same form, and the suit was brought more than twelve years after the date on which the mortgagee was entitled to possession; but within that period, as in the present case, foreclosure proceedings under the Regulation had been taken, and the suit had been instituted within twelve years from the expiration of the year of grace. Upon this it was remarked:

"Now it cannot be said, we think, that, after taking such proceedings, he was only entitled to the time allowed by art. 135 of the Limitation Act as mortgagee. The very fact of his taking foreclosure proceedings changes his interest as mortgagee to that of absolute owner, and as he has brought his suit within twelve years from the date of such change of character, we think he is no longer bound by that article (135). By art. 145, he would be entitled to sue within twelve years after possession became adverse against him. It cannot, we think, be said, that as long as the relation of mortgagor and mortgagee subsisted, the possession of the mortgagor could be adverse to the mortgagee. For the time, therefore, that he was entitled to take possession as mortgagee up to the time that the year of grace expired, possession was not adverse to him; but directly the foreclosure became complete, possession became adverse."

In answer to this case, however, Dr. Gurudas Banerjee, who appeared for the defendant, drew attention to a decision of the Judicial Committee of the Privy Council, which had not, he said, been considered in the case already quoted. The case is *Forbes v. Amereoonissa Begum* (1); the passage is printed at pages 350, 351. After referring to the various provisions of

For the time, therefore, he was entitled to take possession as mortgagee, and up to the time that the year of grace expired, possession was not adverse to him; but directly the foreclosure proceedings became complete, possession became adverse. He has brought this suit within twelve years from that date, and therefore art. 135 does not affect him, and he is in time. We agree with the decision of the lower Court upon that point.

(1) 10 Moore's I. A., 340.

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1880 Reg. XVII of 1806, the judgment proceeds as follows:
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 DHOO GHOSE. "The general effect of these Regulations is, that if anything
 be due on the mortgage, and the mortgagor make an insufficient
 deposit, and *a fortiori* if he makes no deposit at all, the right of
 redemption is gone at the expiration of the year of grace.

"The title of the mortgagee, however, is not even then complete. It was ruled by Circular Order of the 22nd of July 1813, No. 37, and has ever since been a settled law, that the functions of the Judge under Reg. XVII of 1806, s. 8, are purely ministerial; and that a mortgagee, after having done all that the Regulation requires to be done, in order to foreclose the mortgage and make the conditional sale absolute, must bring a regular suit to recover possession, if he is out of possession, or to obtain a declaration of his absolute title, if he is in possession.

"In that suit the mortgagor may contest, on any sufficient grounds, the validity of the conditional sale, or the regularity of the proceedings taken under the Regulation in order to make it absolute. He may also allege and prove, if he can, that nothing is due, or that the deposit (if any) which he has made, is sufficient to cover what is due; but the issue, in so far as the right of redemption is concerned, will be, whether any thing at the end of the year of grace remained due to the mortgagee, and if so, whether the necessary deposit has been made. If that be found against the mortgagor, the right of redemption is gone."

A very able argument has been addressed to us upon the question, and another recent decision of this Court has been cited—*Lall Mohun Gungopadhya v. Prosunno Chunder Banerjee* (1)—in which the decision appears to have been in favor of the contention raised by the respondents in the present appeal. The case is very shortly reported, and the facts are not stated in the judgment, which alone is printed; but on referring to the records of the case, we find that the suit was one which was instituted "on the strength of foreclosure proceedings and for possession of the mortgaged premises by virtue of the sale having become absolute."

The Court of first instance appears to have decided the case upon the authority of the case of *Huro Chunder Gooho v. Gudadhar Koondoo* (1), which case was decided in 1866, when the Limitation Act, XIV of 1859, was in operation. It was there decided, however, that the foreclosure "gave the plaintiff no fresh starting point," and these words are relied upon in the present case. The plaintiff appealed to the Additional Judge, who reversed this decision, on the ground that the mortgagor was not in possession adversely to the plaintiff.

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The decision of this Court, on special appeal in *Lall Mohun's case* (2), was founded on the words of art. 135 of the Limitation Act of 1871, the Court holding that the earlier decisions on the Act of 1859 were inapplicable to this case; and it was held that, under art. 135, the mortgagee must sue within the specified time, when he was entitled to possession under the deed. Thus the suit was treated as a suit by a mortgagee.

In the Presidencies of Madras and Bombay, where the Regulation, XVII of 1806, does not apply, the law, although it has been disturbed by a series of decisions which have been expressly declared by the Judicial Committee to be quite unsound in principle—(*Thumbusawmy Moodelly v. Hossain Rowthen* (3))—gives to the purchaser under a conditional sale an absolute right upon default of payment on the day stipulated. "The essential characteristic of a mortgage by conditional sale was, that, on the breach of the condition, the contract executed itself and the transaction was closed, and became one of absolute sale without any further act of the parties or accountability between them. That it still has this effect in the Presidency of Madras, was what was decided by the case in 13th Moore's Appeals;" referring to the case of *Pattabhiramier v. Venkatarrow Naicken* (4), and so it was in the case of conditional sales prior to the Regulation of 1806 in Bengal; *Sarifunnissa v. Sheikh Inayet Hossein* (5).

The purpose for which the Bengal Regulation, XVII of 1806, was passed, is stated in the preamble, section 1, as follows:—

(1) 6 W. R., 184. (2) 24 W. R., 433. (3) 1 L. R., 1 Mad., 1.

(4) 13 Moore's I. A., 560; S. C., 7 B. L. R., 136.

(5) B. L. R., Sup. Vol., 415; S. C., 5 W. R., 88.

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“It is further requisite for the purpose of preventing improvident and injurious transfers of landed property at an inadequate price by the forfeiture of mortgages accompanied with a condition of sale to the mortgagee, if the amount advanced be not repaid within a stated period (which description of mortgage is common throughout the country, under deeds of baibilwafa, kot-kobala, and other similar designations) that an equitable provision should be made for allowing a redemption of the estate within a reasonable and limited period, on payment of the principal sum lent, with interest thereupon, if the mortgagee shall not have been put in possession.” So that the period within which the right of redemption was to remain, was to be extended, for a reasonable and limited period, beyond the actual date fixed for payment by the deed itself; and certain provisions as to notice to the mortgagor, &c., were made for carrying out that object. That is all the Regulation purported to do, and all that it did, in this respect. Beyond that it did not interfere with the rights of the purchaser under the conditional sale, which were well established, and which it recognised, namely, that when the period for payment had elapsed, the purchaser became absolute owner of the property. But that period was to be extended.

The case of *Forbes v. Ameeroonissa Begum* (1) was a suit for possession of a taluq, which had been the subject of a mortgage by conditional sale; proceedings had been taken to foreclose under Reg. XVII of 1806. It was found that the plaintiff was really in possession under a benami lease, and it was held, that he was entitled to possession without producing accounts of the usufruct of the estate, it appearing that the foreclosure proceedings had been regular, and that the debt was admittedly unpaid.

If the relationship of mortgagor and mortgagee had subsisted between the plaintiff and defendant when the suit was brought, the Judicial Committee would not have decided that the accounts were unnecessary, because the liability to account is one that arises on that relationship when the mortgagee is in possession, and continues so long as he is in possession; and as it

(1) 10 Moore's I. A., 340.

was found in that case that the mortgagee was in possession from the beginning, the decision of the Judicial Committee that he was not to account, must have proceeded on the ground that when these foreclosure proceedings (in all respect regular) had terminated, the debt being unpaid, the relation of mortgagor and mortgagee had ceased to exist. The plaintiff did not in that case sue to recover possession as mortgagee, but he claimed to be absolute owner, and it was decided that he was entitled to succeed.

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So again the right to redeem is an incident which, by the terms of the Regulation, is gone when the foreclosure is completed by the expiration of the year of grace. The Judge, under s. 8, is to notify this to the mortgagor; he is to inform him that if he do not redeem the property in the manner provided within one year from the date of the notification, the mortgage will be finally foreclosed, and the conditional sale will become conclusive. The right to redeem when it existed was preserved against the operation of the law of limitation for a period of sixty years. But where foreclosure proceedings were completed by the expiration of the year of grace, the mortgagor was held to be barred, if he did not sue to open up the foreclosure within twelve years: *Lotf Hossein v. Abdool Ali* (1). This case can have been decided upon no other ground than that his position was changed by the foreclosure.

In addition to the authority of the case of *Ghinaram Dobey* (2) lately decided by this Court, the case of *Jeora Khun Singh v. Hookum Singh* (3) has been cited. There the learned Judges of a Division Bench of the High Court, then at Agra, had before them a suit brought by the mortgagees under a deed of conditional sale, after foreclosure proceedings, the object of which was to obtain possession of the property and mesne profits from the date at which the foreclosure proceedings terminated. It was contended that their right to possession did not become complete until they had obtained a decree for possession, and the passage already quoted from the judgment in the case of *Forbes v. Ameeroonissa Begum* (4) was cited in support of that argument,—

(1) 8 W. R., 476. (2) *Ante*, p. 566, note. (3) 5 Agra H. C. R., 358.

(4) 10 Moore's L. A., 340, at pp. 350—351.

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namely, "the title of the mortgagee is not even then complete." But the learned Judges observed that, "reading the passage cited on behalf of the defendants with what immediately follows it, and referring to the Circular Order (of the 22nd of July 1813), to which reference is made by their Lordships, we do not understand them to rule that the absolute right of the conditional purchaser has not accrued to him at the conclusion of the proceedings taken under the Regulation, or that it is not (if those proceedings were regular) to be referred back to that period. But we understand them to rule that a conditional purchaser, if out of possession, cannot obtain possession by summary application to the Judge, before whom the foreclosure proceedings were held; but that he must proceed by regular suit. And that, in like manner, if he is in possession at the termination of the foreclosure proceedings, and finds it necessary to vindicate his title, he must do so by a regular suit."

The learned Judges of the High Court at Agra quote the Circular Order of 22nd July 1813, and two other Circular Orders, of the 25th of May 1832 and of the 17th of June 1834, which are to the same effect. All these Circular Orders show that they were directed against a practice which had grown up, and to which they advert, for the mortgagee to make an application to the Judge on the expiry of the year of grace to be summarily put in possession of the property. The learned Judges of the Agra Court go on to say: "The Regulation expressly declares, that, on the expiry of one year from the date of the notification, 'the mortgage will be finally foreclosed, and the conditional sale will become conclusive.' And the Sudder Court, while it was fully competent to keep within due limits the exercise of their legitimate powers by Courts subordinate, was not competent to legislate and impose on conditional purchasers, as necessary to the perfection of their rights, a condition not prescribed by the Regulation. But in truth the Sudder Court did no more than it was competent to do. It ordered the subordinate Courts to abstain from the exercise of a jurisdiction which was not conferred on them by the Regulation, and it left conditional purchasers, who had obtained foreclosure, if they required the assistance of the

Court to obtain the enjoyment of their rights, to proceed in due course by the institution of regular suits." And they quote a passage from Mr. Justice Macpherson's work on Mortgages.

" ' with that year (of grace) ends the mortgagor's whole interest in his property, unless he can prove that, previous to its lapse, he was entitled to have it declared that the mortgage had been redeemed; ' "—and they held that the rights of the mortgagee who had foreclosed, *i.e.* absolute rights, must, if established where they are contested, be referred back to the period at which the proceedings under the Regulation came to an end, and must be held to have become absolute at that date; and they accordingly gave him mesne profits, to which, if he had remained a mortgagee, he would not have been entitled. Dr. Gurudas argues, that this is not the case, but this argument appears to be answered in the case of a mortgage by conditional sale by the following passage of the judgment of the learned Judges of the Agra Court, who say,—“indeed, were we to hold otherwise, *i.e.*, that the plaintiff is not entitled to mesne profits,” we should be doing injustice to the conditional purchaser, for from the termination of the foreclosure proceedings he can claim no interest upon the mortgage debt; and if the conditional vendor was not answerable for mesne profits for the period antecedent to the recovery by the purchaser of a decree for possession, it would, in many cases, be to his interest to prolong to the utmost limit frivolous and vexatious litigation.”

Mesne profits appear to have been given by this Court in a similar case—*Mussamut Pandroo Koonwar v. Mohesh Chunder Mookerjee* referred to in *Jeora Khun Singh v. Hookum Singh* (1).

The two cases of *Deno Nath Gangooly v. Nursing Proshad Dass* (2) and *Mankee Kooer v. Sheikh Munnoo* (3) do not appear to me to have any bearing upon the present case. The question in these cases arose under the Limitation Act of 1859, and the Court was asked to decide when the cause of action arose, and that depended upon the right to possession in the plaintiff, and the adverse possession of the defendant. In the first case, the defendants having purchased from the vendor under

(1) 5 Agra H. C. R., 358.

(2) 14 B. L. R., 87; S. C., 22 W. R., 90.

(3) 14 B. L. R., 315; S. C., 22 W. R., 543.

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1880 the conditional sale at an auction without notice of the mortgage, and having got into possession, and claiming as absolute owners, their possession was held to be adverse to the conditional purchaser; and having been so in possession for twelve years, during which period, the purchaser had a right to possession, he was barred by limitation, and could not, by taking proceedings to foreclose under the Regulation, obtain a fresh start; but that decision is not inconsistent with the proposition that the purchaser has a different title under the kotkobala to that which he acquires after the termination of the year of grace. Whatever his title may have been, whether as mortgagee or as absolute owner, the defendant had held adversely to him for twelve years. It was held that the purchaser had a right to possession on default of payment in terms of the deed, which stipulated that, "if I don't repay the whole money within the period, then this conditional bill will be reckoned as a true and absolute bill of sale; my and my successor's rights will cease to the said zemindari; the proprietary rights, with the rights of gift and sale to it, will accrue to you and your successors; and registering your names on the sherista of the collectorate you will take possession of it in the mofussil, and on payment of revenue, you, your sons, grandsons, &c., will continue to have felicitous occupation and possession thereof." This was held to give the purchaser a right to possession, not as absolute owner, but as mortgagee accountable to the mortgagor for the profits which he received subject to redemption within the period specified by the law of limitation, unless he should in the meantime have taken proceedings for foreclosure.

In the other case the possession of the mortgagor asserting only a title as mortgagor consistent with the mortgage by conditional sale could not be considered as a holding adversely to the conditional purchaser so as to create a cause of action within the meaning and intention of the Limitation Act.

The question of adverse possession in these two cases was decided in conformity with two decisions of the Judicial Committee in *Pran Nath Roy Chowdry v. Rookea Begum* (1) and *Anundo Moyee Dossee v. Dhonendro Chunder Mookerjee* (2).

(1) 7 Moore's I. A., 323. (2) 14 Moore's I. A., 101; S. C., 8 B. L. R., 122

In the present case it is not contended that the possession of the vendor prior to the termination of the foreclosure was adverse to the purchaser.

It is not necessary to consider the question whether the article (135) had the effect of obliging the mortgagee to sue for or to take proceedings within a particular period to foreclose his mortgage, nor to do more than to say that, agreeing with the view taken by the High Court at Agra and by Mr. Justice Pontifex, I am of opinion, that the present suit is not barred by limitation, and that the appellant is entitled to succeed.

MCDONELL, J.—This case is in all fours with the case decided on 6th May last by Mr. Justice Pontifex and by me (No. 126 of 1879) (1), and for the reasons given in that judgment I hold that the present suit is not barred by limitation, and that the appellant is entitled to succeed. The case must be remanded to the Subordinate Judge for a trial on the merits. Costs to follow the result.

Case remanded.

APPELLATE CRIMINAL.

Before Mr. Justice Morris and Mr. Justice Prinsep.

RAM CHUNDER SHAW AND OTHERS v. THE EMPRESS.*

1881
Jan. 5.

Bengal Excise Act (Beng. Act VII of 1878), ss. 9, 58, 74—Introduction into Calcutta of Spirituous Liquor manufactured elsewhere—Limits fixed by Collector—Additional Punishment—Alternative Sentence of Imprisonment.

The provisions of s. 74 of the Beng. Excise Act as to additional punishment, where there has been a "previous conviction for a like offence," contemplate merely the case of the offender having been already convicted of an offence punishable with a fine of Rs. 200 or upwards, and being again convicted of another offence punishable with the same punishment; it is not necessary that he should have been previously convicted of the same offence.

* Criminal Appeal, No. 765 of 1880, against the order of F. J. Marsden, Esq., Chief Presidency Magistrate of Calcutta, dated the 20th November 1880.

(1) *Ante*, p. 566, note.

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The accused were sentenced by the Presidency Magistrate, under ss. 58 and 74 of the Beng. Excise Act, to a fine of Rs. 200 each, in default to three months' imprisonment, and in addition to six months' imprisonment, which was the maximum term that could be awarded under s. 74. *Held*, that the sentence of imprisonment was not in excess of the powers given to the Magistrate by s. 12 of the Presidency Magistrates' Act, the imposition of the additional sentence of imprisonment not affecting the Magistrate's powers as regarded the original sentence under s. 58.

No limits with regard to any distilleries in Calcutta having been fixed under s. 9 of the Act within which spirituous liquor manufactured otherwise than in that particular distillery, shall be introduced or sold without a special pass, and the fixing of such limits being necessary to a conviction of an offence under s. 58, the convictions in this case were set aside.

IN this case Obinash Chunder Shaw, Husnool Khan, Ram Chunder Shaw, Chinibash Shaw, Adhore Chunder Shaw, and Baueshur Shaw were charged with having introduced for sale spirituous liquor into the town of Calcutta, at 14, Mechooa Bazar Street, without a special pass from the Collector, the said spirit not having paid duty as required by s. 18 of Beng. Act VII of 1878, and not having been manufactured at a distillery within the limits of the town, in contravention of ss. 9 and 58 of the said Act, and also for having in their possession spirituous liquor without a pass in contravention of ss. 17 and 61 of the same Act. They were tried before the Chief Presidency Magistrate, and Obinash and Baueshur were each fined Rs. 100, in default to undergo three months' rigorous imprisonment; and Ram Chunder, Chinibash, and Adhore Chunder were each fined Rs. 200, in default to undergo three months' rigorous imprisonment, and in addition to undergo six months' rigorous imprisonment. Husnool Khan was discharged.

From this sentence Ram Chunder, Chinibash, and Adhore Chunder appealed to the High Court.

Mr. R. Allen for the appellants.

The *Standing Counsel* (Mr. Phillips) for the Crown.

The judgment of the Court (MORRIS and PRINSEP, JJ.) was delivered by

PRINSEP, J.—The three appellants before us, as well as two others, have been convicted and sentenced under s. 58 of the

Beng. Excise Act (Beng. Act VII of 1878), and in addition to the penalty prescribed thereby, they have, under s. 74, been sentenced to imprisonment, in consequence of their having been previously convicted of an offence under the Act punishable with a fine of Rs. 200 or upwards.

The Presidency Magistrate has recorded on the proceedings of the trial that he has "not the least doubt that the defendants (with the exception of Husnood, who has been discharged) did introduce spirituous liquors without a pass, and have committed an offence under s. 58 of the Excise Act."

To constitute an offence under the latter part of s. 58, it is necessary that the offender shall have introduced, or attempted to introduce, for sale, spirituous liquors manufactured at another place into the limits fixed for the consumption of such liquors manufactured at such distillery (*i.e.*, a distillery established under s. 9) without a special pass from the Collector.

In the present case, we find that there is some evidence which apparently the Magistrate has believed to show that the liquor seized in Calcutta had been manufactured in Tallygunge, a suburb. Under the circumstances it is not necessary for us to express any opinion on the value of that evidence. But Mr. R. Allen for the appellant has maintained, and the Standing Counsel for Government, who appeared to support the conviction, has ultimately admitted, that the Collector of Calcutta, up to the present time, has not, under s. 9, fixed limits with regard to any distillery in Calcutta within which no spirituous liquor manufactured after native processes except in that particular distillery shall be introduced or sold without a special pass. There cannot, therefore, be the special protection necessary to constitute an offence under s. 58, and the conviction and sentences passed on the appellants must accordingly be set aside.

Two other persons have been convicted simultaneously with the appellants, who have not been able to appeal, their sentences not being appealable. We have already held that no offence has been committed, and we therefore feel bound to deal with their cases under s. 147 of the High Courts' Criminal Procedure Act. The Standing Counsel, on behalf of Government, consents to

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our proceeding summarily with this matter without complying with the special procedure provided by s. 181 of the Presidency Magistrates' Act, and as this would necessitate a mere compliance with form without any possible advantage, we direct that the conviction and sentences passed on these two men, Obinash Chunder Shaw and Baneshur Shaw, be set aside. The fines, if paid, will be refunded; and the appellants will be released from jail.

It is right that we should notice two objections taken in this appeal to the legality of the sentences passed. Mr. Allen first contended that, in order to render an offender under the Beng. Excise Act liable to additional punishment under s. 74, it is necessary that he should have been previously convicted of the *same* offence, the words *like offence* being synonymous with *same offence*. It appears to us, however, that the section contemplates merely that the offender having been already convicted of an offence punishable with fines of 200 or upwards should be again convicted of another offence punishable with the same punishment, and that this is the correct interpretation to be put on the term *like offence*. The additional sentence of imprisonment passed under s. 74 would not be illegal if, in the case now before us, an offence had been established under s. 58.

The other objection is, that the alternative sentence of imprisonment—*viz.*, three months' rigorous imprisonment in default of payment of the fine imposed—is beyond what the Magistrate can inflict under s. 12 of the Presidency Magistrates' Act (IV of 1877). Mr. Allen contends that, as under s. 74 of the Beng. Excise Act, the appellants were liable to imprisonment for a term not exceeding six months, the Magistrate, under s. 12 of the Presidency Magistrates' Act, could not sentence them to undergo imprisonment for more than six weeks,—*i.e.*, one-fourth of six months, on default of payment of the fine imposed.

It appears to us, however, that the appellants have been sentenced practically to two sentences,—one under s. 58 to fine of "rupees one hundred each, in default to undergo three months' rigorous imprisonment each;" and the other under s. 74, in addition to the penalty under s. 58, to imprisonment each for six months. The imposition of the additional sentence would not

affect the Magistrate's powers as regards the original sentence under s. 58. It cannot be denied that, standing by itself, the sentence under s. 58 is perfectly legal; but it is contended that, by reason of the additional sentence of imprisonment under s. 74, the term of imprisonment in default of payment of the fine imposed under s. 58 is excessive, and therefore illegal. We see no valid reason for this contention, and indeed it would be an anomaly if a sentence perfectly legal under s. 58 should become otherwise, because the offender had rendered himself liable to an *additional* punishment on account of a previous conviction under the Beng. Excise Act.

We observe that this case was heard by the Magistrate on the 6th, 9th, and 16th November, though it was of a nature which should ordinarily have permitted of its decision at the first hearing. No reason is assigned for the postponements, if it existed, or that they were owing to the absence of the necessary evidence for the prosecution. We think it necessary to notice this, because frequent postponements add considerably to the expense incurred by the parties, and should be avoided.

We observe also that, in the affidavit it is stated on behalf of appellants that "application was made to the Magistrate for copies of the evidence in this case, but the same was refused," notwithstanding the terms of s. 170 of the Presidency Magistrates' Act.

Conviction set aside.

Before Mr. Justice Mitter and Mr. Justice Maclean.

IN THE MATTER OF THE PETITION OF PANJAB SINGH AND ANOTHER.

THE EMPRESS v. PANJAB SINGH AND ANOTHER.*

1881
Jan. 5.

Criminal Procedure Code (Act X of 1872), s. 227, cl. (h)—Recording Reasons for Conviction—Practice of High Court on Revision.

Under cl. (h) of s. 227 of the Criminal Procedure Code, although a Magistrate is not required to record any evidence, he should, in recording his reasons for the conviction, state them so, that the High Court, on revision,

* Criminal Motion, No. 300 of 1880, against the order of A. W. Paul, Esq., Assistant Commissioner of Darjeeling, dated the 23rd October 1880.

1881 may judge whether there were sufficient materials before him to support the conviction.
 IN THE MAT. conviction.
 THE OF THE Where they were not so stated, the High Court, on motion, set the conviction aside.
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THE accused were found guilty of an offence under s. 447 of the Penal Code. It appeared there was gambling going on in the house of one Jakri, in which the accused confessedly took part. The gambling ended in a quarrel and consequent disturbance, which caused great annoyance and alarm to the women in the house. The Assistant Commissioner was of opinion, that although the original entry might be considered lawful, their remaining there to gamble and creating a disturbance was sufficient to bring the accused within s. 447 of the Penal Code.

Against this order the accused filed a petition in the High Court.

Mr. M. M. Ghose and Baboo Boidonath Dutt appeared for the petitioners.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J.—We are of opinion that the conviction in this case must be set aside. The lower Court is of opinion that the prisoner is guilty, under s. 447 of the Indian Penal Code, of criminal trespass. In order to constitute that offence, it is necessary to establish, on behalf of the prosecution, that the entry into another person's property must have been made with intent to commit an offence, or to intimidate, insult, or annoy that person in his possession, or that, having lawfully entered the premises, remaining there for the purpose of intimidation, annoyance, or insult, or with intent to commit an offence. Now in this case, which was tried summarily, we have simply before us the finding and the reasons upon which the conviction is based under cl. (h), s. 227 of the Code of Criminal Procedure. Under that section the Magistrate was not required to record any evidence.

We think that, under the clause in question [cl. (h) of s. 227], a Magistrate, in recording his reasons for the conviction, should

state them so, that this Court, on revision, may judge whether there were sufficient materials before him to support the conviction.

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In this case we do not find that there is any finding at all in the reasons stated, that the applicants remained in the premises on which they are alleged to have trespassed with any such intents as are mentioned in s. 447 of the Penal Code. All that the lower Court upon that point says is this, that "their original entry on the property was lawful, but their remaining there to gamble and creating a row must be held to bring the accused within s. 447." It does not even say that they remained there in order to create a row, but simply that they remained there to gamble, and then created a row afterwards. Even if the lower Court had found that they remained there to create a row, it would have been doubtful whether such a finding would have been sufficient, because it would have been as much consistent with the knowledge that they were likely to annoy as with the intention to do so. But as the finding now stands, there is not a shadow of ground for supposing that there was any evidence before the lower Court upon which it could be found that they remained there with any such intent as it is necessary to establish under s. 447.

The conviction is, therefore, set aside, and the applicants directed to be released.

Conviction set aside.

CRIMINAL REFERENCE.

Before Mr. Justice Mitter and Mr. Justice Maclean.

MONA SHEIKH v. ISHAN BARDHAN.*

1881
Jan. 10.

*Criminal Procedure Code (Act X of 1872), s. 211—Order of Acquittal—
Compensation to Accused.*

An order for compensation against a complainant may be made on an order of acquittal under s. 211 of the Criminal Procedure Code.

* Criminal Reference, No. 211 of 1880, and letter No. 2987 from A. J. Alexander, Esq., Magistrate of Mymensing, dated the 14th December 1880.

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THE complainant, Mona Sheikh, complained before the police at Gopalpore, that the accused and others arrested him, took him to one Poran Bardhan's house, maltreated him, and kept him in confinement, but afterwards released him. The accused was discharged at the hearing before the Sub-Deputy Magistrate, a Magistrate who could only exercise 3rd class power under s. 211 of the Criminal Procedure Code, and the complainant was directed to pay the accused Rs. 20 as compensation. The case was referred by the Joint Magistrate to the High Court, under s. 226 of the Criminal Procedure Code.

The material portion of the opinion of the Court was as follows :—

MITTER, J.—We do not think that the trial and acquittal were illegal. As for the order for compensation, s. 209 seems to contemplate a dismissal of the complaint rather than an acquittal of the accused; but referring to s. 212 and to the order in which the sections come, we are not prepared to say that an order to pay compensation may not be added to an acquittal.

Before Mr. Justice Mitter and Mr. Justice Maclean.

1881
Jan. 13.

THE EMPRESS v. SALIK ROY.*

Penal Code (Act XLV of 1860), s. 211—Charge made on Report of Police that Case was False—Charge of giving False Information.

A commitment for trial under the provisions of s. 211 of the Penal Code, for knowingly instituting a false charge with intent to injure the persons accused, is not illegal, merely because the complaint which the accused made has not been judicially enquired into, but is based on the report of the Police that the case was a false one.

SALIK ROY, the accused, sent information to the Police through the chowkidar, charging certain persons with setting fire to his house; and he repeated the charge to the Police officer who went to his village to investigate the case. In the end the Police reported the case to be a false one. The Magistrate, thereupon,

* Criminal Reference, No. 213 of 1880, and letter No. T.b. 1, from J. F. Stevens, Esq., Officiating Sessions Judge of Sarun, dated the 18th December 1880.

at once directed the prosecution of Salik Roy for giving false information, without calling upon him or giving him any opportunity to prove his case. Salik Roy was committed to the Court of Session for trial, under the provisions of s. 211 of the Penal Code, for knowingly instituting a false charge with intent to injure the persons whom he accused.

The Sessions Judge, being of opinion that the commitment was illegal and against a decision of the High Court, which he referred to but did not name, sent the record to the High Court in order that the commitment might be quashed, or such other order passed as should seem proper to the High Court.

The following was the opinion of the High Court :—

MITTER, J.—This is a reference from the Judge of Sarun asking us to quash a commitment. The ground upon which we are asked to do so is, that the accused, who is charged with an offence under s. 211, Penal Code, should not have been committed for trial until the complaint which he made had been judicially enquired into; and the Judge refers to a case decided by this Court which he considers applies to the present case.

If the case referred to by the Sessions Judge is the case of *Biyogi Bhagut* (1), we may point out that it is not in all respects similar to the present case. In that case the complainant, dissatisfied with the Police investigation and report, made a complaint to the Magistrate, which was dismissed without hearing his witnesses.

We do not find in the record that there was any complaint made to the Magistrate in this case; but on the report of the Police that the case was false, the prosecution of the complainant was set on foot. We are unable to say that there is anything illegal in the proceedings, and we are supported in this view by the case of *Empress v. Abul Hasan* (2). We are not aware of any recent ruling of this Court of a contrary tenor. We must, therefore, refuse to quash the commitment on the ground on which the Judge's recommendation is based; see *Ashrof Ali v. The Empress* (3).

(1) 4 C. L. R., 134. (2) I. L. R., 1 All., 497. (3) I. L. R., 5 Calc., 281.

Before Mr. Justice Mitter and Mr. Justice Maclean.

1881

THE EMPRESS v. SHIBO BEHARA.*

Jan. 20.

Penal Code (Act XLV of 1860), s. 211—Sanction to Prosecution for making False Charge.

A sanction for a prosecution for making a false charge under s. 211 of the Penal Code, without hearing all the witnesses whom the person accused of making the false charge wishes to produce, is illegal.

The High Court has power to quash an illegal commitment at any stage of the case.

THE accused Shibo Behara, at Teapo Police outpost, brought a charge against one Bali Jenna and others of arson. The Police took up the case and reported it to be a false charge, and the Magistrate, thereupon, sanctioned the prosecution of Shibo Behara, under s. 211 of the Penal Code. Previously to this order, however, Shibo presented a petition to the Magistrate asking for a judicial enquiry; but this petition does not appear to have been disposed of. The case under s. 211 was sent to a Deputy Magistrate, who committed the accused for trial. Before the Sessions Judge the accused pleaded not guilty, and objected to being tried, on the ground that he had been prejudiced by the refusal to grant judicial inquiry he asked for.

The Sessions Judge, being of opinion that the objection was a good one, and that the commitment should be, therefore, quashed, referred the case to the High Court under s. 296 of the Criminal Procedure Code, in his reference citing the following cases:—*In the matter of Gour Mohan Sing* (1), *In the matter of Bishoo Barik* (2), *Ashrof Ali v. The Empress* (3), *Nusibunnissa Bibee v. Sheikh Erad Ali* (4), *Sheikh Erad Ali v. Nusibunnissa Bibee* (5), and *Government v. Karimdad* (6).

* Criminal Reference, Nos. 226 and 227 of 1881, and letters Nos. 120 and 121, from the order of A. W. Cochran, Esq., Officiating Sessions Judge of Cuttack, dated the 27th December 1880.

(1) 8 B. L. R., Ap., 11.

(4) 4 C. L. R., 413.

(2) 16 W. R., Cr., 77.

(5) *Id.*, 534.

(3) 1. L. R., 5 Calc., 281.

(6) *Ante*, p. 496.

The following were the opinions of the High Court :—

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MITTER, J.—Whether the Judge was right or not in postponing the trial after it had once begun, I think this Court has the power to quash an illegal commitment at any stage of a criminal proceeding.

In these two cases I am of opinion that the commitments should be set aside on the ground that the sanction for prosecution under s. 211 was illegally given. Whatever might have been said in *Nusibunnissa Bibee v. Sheikh Erad Ali* (1), the later cases have distinctly laid it down that a sanction for prosecution under s. 211 given without hearing all the witnesses whom a complainant wishes to produce in Court, is illegal. In these cases, therefore, the original orders sanctioning prosecution under s. 211 are illegal. That being so, the commitments are also illegal. I would, therefore, set them aside as recommended by the Judge.

MACLEAN, J.—The principle involved in these cases is the same as that involved in the case of *Chukrodhur Pati* just disposed of; and as I am of opinion that any convictions had upon the trials under the commitments which we are asked to quash would be set aside, I think the simplest course is to set aside the proceedings at this stage.

SMALL CAUSE COURT REFERENCE.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice White, and Mr. Justice Mitter.

KALI KUMAR ROY (PLAINTIFF) v. NOBIN CHUNDER CHUCKERBUTTY (DEFENDANT).*

1880
Jan. 13.

Pleaders and Muktears' Act (XX of 1865), ss. 11, 13—Muktears and Private Agent, Distinction between.

Per WHITE and MITTER, JJ.—The mere fact that a person looks after an appeal and gives instructions to pleaders in connection with such appeal, does not show that such person was practising as a muktear within the meaning of s. 13 of Act XX of 1865.

* Small Cause Court Reference, No. 2 of 1880, from Baboo Amrita Lall Chatterjee, Judge of the Small Cause Court at Dacca, dated the 19th December 1879.

1880 *Per* GARTH, C. J.—Where a person is in the habit of acting for persons in
KALI KUMAR ROY Courts of law, and holds himself out as ready to perform what is usually
v. considered muktear's work, for reward, such person is no less acting as a
NOBIN CHUNDER CHUCKER-BUTTY. muktear on any particular occasion, because he may have abstained on the
 particular occasion from doing any of those acts which a duly qualified
 muktear is alone legally capable of performing.

THIS case was referred for the opinion of the High Court; the facts being fully set out in the following order of reference:—

“The plaintiff, who had not been admitted and enrolled as a duly qualified muktear, was employed by the defendant for the purpose of looking after a regular appeal of his and giving instructions to the pleaders in connection with it. In consideration of the plaintiff's agreeing to perform these services, the defendant promised to pay him Rs. 100 as remuneration.

“The plaintiff having performed the services which he had agreed to perform, now sues the defendant for the recovery of his remuneration.

“The defendant contends that the plaintiff is, under s. 13, Act XX of 1865, incapable of maintaining the present action. His argument is, that when the plaintiff agreed to look after, and did actually look after, a case of the defendant in a Civil Court, and gave instructions to the pleaders on behalf of the latter, he was necessarily practising as a muktear in that Court in connection with that case; and that as he had not previously obtained a proper certificate authorising him so to practise, he came under the provisions of s. 13 of Act XX of 1865, and his suit is, under the latter part of that section, not maintainable in a Court of justice.

“This argument seems to me to make two assumptions, the correctness of neither of which I am prepared to admit:—1st, that any one who looks after a case of another and gives instructions to the pleader engaged in it, is necessarily a muktear within the meaning of Act XX of 1865; and 2ndly, that looking after a case of another and giving instructions to pleaders, amount to practising as a muktear within the meaning of s. 13 of the Act.

“The case of *Fuzzle Ali* (1) seems to show that a private agent may go between the client and his vakil without his being a muktear under Act XX of 1865. The Hon’ble Mr. J. Phear, in delivering the judgment of the Court, said, “there is nothing either in the words of the Act (meaning XX of 1865), or in its spirit, to prevent him (*Fuzzle Ali*) as *private agent* from going between the prisoner and the duly authorized vakil.” The case of *Gujraj Singh* (2) would seem to show that there is nothing in Act XX of 1865 to restrain any person from supplying information to vakils in the presence of the Judge.

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“Even the new Act (XVIII of 1879), which is evidently more stringent in its provisions than the one which is still in force, does not prohibit private servants of persons from giving instructions to pleaders (s. 13).

“So far as I can see, the plaintiff here was not a muktear within the meaning of Act XX of 1865, but merely a private agent of the defendant appointed for the purpose of going between him and his vakils, and giving instructions to the latter, and generally looking after the progress of the case. The words ‘practise as a muktear’ used in s. 13 of the Act appears to my mind to mean simply ‘to appear or act as a muktear.’ Looking after a case and giving instructions to pleaders appear to me to be quite different from appearing or acting within the meaning of s. 5 of the Act. ‘The word act in s. 5 of the Statute has been construed to mean the doing something as the agent of the principal party, which shall be recognized, or taken notice of, by the Court as the act of that principal;’ *vide Fuzzle Ali* (1).

“There is nothing to show in the present case that the plaintiff did anything of the kind in connection with the regular appeal, which he was employed to look after, which could in any sense be construed to be the doing of something as the agent of defendant which could be recognized, or taken notice of, by the Court as the act of the defendant. Looking after a case and giving instructions to pleaders do not, in my opinion, amount to either appearing or acting as a muktear, or, which is

(1) 19 W. R., Cr. Rul., 8.

(2) 10 W. R., 355.

1880 the same thing, practising as such; *vide Kali Charan Chund* (1).
KALI KUMAR ROY The plaintiff, therefore, did not practise as a muktear with-
v. in the meaning of s. 13 of Act XX of 1865, by simply look-
NOBIN CHUNDER ing after the progress of a regular appeal in a Civil Court
CHUCKER-BUTTY. and giving instructions to the pleaders engaged in it. The
 section does not in consequence stand as a bar to the main-
 tenance of the present suit.

"I have, however, serious doubts as to the correctness of my conclusions, firstly, because I have nowhere been able to find a correct definition of the word 'muktear' as used in Act XX of 1865, and also because I have been pressed with the conviction that dalals or touters who ought not to be allowed to enter the precincts of our Courts of Justice will be encouraged to ply their trade if the opinion which I have come to on the question of law involved in the case be good and correct law."

The Judge decreed the case in favor of the plaintiff, contingent on the opinion of the High Court on the following points:—

1. Whether looking after a case of another and giving instructions to the pleaders engaged in it necessarily amount to practising as a muktear?

2. Whether an agreement to do these acts by a person not duly admitted and enrolled as a muktear is contrary to law?

3. Whether upon the facts found above plaintiff is entitled to recover?

No one appeared before the High Court.

The following were the opinions of the Court:—

WHITE, J. (MITTER, J., concurring):—The third point as stated by the Small Cause Court Judge virtually raises all the questions upon which the opinion of this Court is sought.

The third point is whether, upon the facts found, the plaintiff is entitled to recover.

The facts found are these:—The plaintiff, who has not been admitted and enrolled as a muktear, and consequently is not

in possession of a certificate authorizing him to act as a muktear, was employed by the defendant for the purpose of looking after a regular appeal which has been preferred by the defendant and also for giving instructions to the pleaders in connection with that appeal. The remuneration for the services was fixed by agreement at Rs. 100. The services have been performed. The plaintiff sues for the Rs. 100. The defendant resists payment on the ground that, by virtue of s. 13 of Act XX of 1865, the plaintiff is incapable of maintaining a suit for the agreed reward. Section 13 of the Act cited enacts, amongst other things, that any person who shall practise as a muktear in any Civil or Criminal Court without having previously obtained a certificate, shall be liable to fine, and shall also be incapable of maintaining any suit for any fee or reward for or in respect of anything done by him as such muktear.

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The question then resolves itself into this, whether the looking after a regular appeal and the giving instructions to pleaders in connection with it are a practising as a muktear within the meaning of the section. There is no definition in the Act of what the Legislature meant by practising as a muktear. But I think the meaning may be gathered from s. 11 of the Act, which enacts that "muktears" duly admitted "and enrolled may, subject to the conditions of their certificates as to the class of Courts in which they are authorized to practise, appear and plead in any Civil Court, and may appear, plead, and act in any Criminal Court within the same limits." It may fairly be concluded from this that, by practising as a muktear in a Court, the Legislature meant, in the case of a Civil Court, appearing or acting in that Court; in the case of a Criminal Court, appearing, pleading, or acting in the latter Court.

It is not stated in the reference whether the regular appeal preferred by the defendant was a civil or criminal appeal, but this will not affect the decision, as upon the facts found the plaintiff was clearly not employed to plead for the defendant.

Did the plaintiff then appear or act in Court? I think not. These words have a well-defined and well-known meaning.

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To appear for a client in Court is to be present and to represent him in the various stages of the litigation at which it is necessary that the client should be present in Court by himself or some representative. To act for a client in Court is to take on his behalf in the Court, or in the offices of the Court, the necessary steps that must be taken in the course of the litigation in order that his case may be properly laid before the Court. What the plaintiff is found to have done in the present case was not appearing or acting for the defendant in the sense in which I think the words must be understood nor involved any such appearance or acting. It is true that, in rendering the stipulated services, he must have attended the Court and frequented the offices of the Court at certain times, but his presence there was not for the purpose of representing his client or taking any steps in the suit on his behalf, but to watch his case and see that others had taken the necessary steps and were fully informed as to the nature and facts of his employer's case and as to the best mode of conducting it. It would, I think, be a straining of the language of the Act to hold that attendance at the Court and its offices for the latter purposes was a practising as a muktear.

The authorities cited in the reference are in favor of this view.

In the case of *Gujraj Singh* (1), which was an appeal against an order of the Judge of Tirhoot restraining all persons from coming into his Court and instructing pleaders except muktears duly enrolled under Act XX of 1865, Jackson, J., set aside the order saying, that "there is nothing in the provisions of that Act which restrains any person from coming into the presence of the Judge and supplying information to the vakils." In the case of *Kali Charan Chund* (2), the Officiating Joint Magistrate had fined the petitioner under s. 13 of the Act for practising as a muktear without having a certificate. What the petitioner had done was to write out a petition of complaint for one Komiruddin, which Komiruddin presented himself in the Officiating Joint Magistrate's Court.

(1) 10 W. R., 355.

(2) 9 B. L. R., Ap., 18; S. C., 18 W. R., Cr. Rul., 27.

Kemp and Glover, JJ., set aside the order and remitted the fine, remarking that "the mere writing of a petition for a party, who afterwards presents that petition himself," is not "acting in the sense of s. 11 of Act XX of 1865." In the case of *Fuzzle Ali* (1), Phear and Ainslie, JJ., set aside the order and remitted the fine inflicted upon the petitioner for practising as a muktear. The petitioner had, as appears from the judgment of the District Judge, "instructed the vakil, stood behind him during the trial, suggested questions, and taken an active part in the management of the defence." Phear, J., in giving judgment, says:—"I think the word act in s. 5 of the Act means the doing something as the agent of the principal party which shall be recognized, or taken notice of, by the Court as the act of the principal. Such, for instance, as filing a document."

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I am of opinion, therefore, as well upon the authorities as upon the true construction of the Act, that the plaintiff, in rendering the services which he is found to have rendered, was not practising as a muktear within the meaning of the 13th section, and is therefore not debarred from maintaining this suit. If that be so, as the services have been performed, he is entitled to recover the agreed reward from the defendant.

GARTH, C. J.—My learned brothers, in deciding this question, have thought it right to deal with it in the same way as it has been dealt with in the Court below; that is to say, they have merely considered whether, having regard to the facts of this particular case, the plaintiff has done anything for the defendant which a person who is not a qualified muktear is prohibited by law from doing; and if I thought that this was the proper mode of dealing with the question, I should probably have arrived at the same conclusion as they have.

But I think that this is not the fair or proper mode of dealing with the question; and that, for the purpose of ascertaining the plaintiff's right to succeed in this suit, or in other words, for the purpose of ascertaining whether the plaintiff, in what he did for the defendant, *was acting as a muktear*, it

1880 is necessary to enquire whether the plaintiff really acted in
 KALI KUMAR ROY this instance as a private agent of the defendant, or as a
 v. NOBIN CHUNDER CHUCKERBUTTY. muktear habitually practising in the Courts as such. If the
 plaintiff merely acted as the private agent of the defendant
 in giving instructions to the pleader, and abstained from doing
 any of those acts which by law can only be done by a duly
 qualified muktear, then I think Mr. Rampini is quite right in
 holding that the plaintiff is entitled to recover his promised
 remuneration. But if the plaintiff is in the habit of acting for
 clients generally in Courts of law, and holds himself out as ready
 to perform what is usually considered muktear's work for reward,
 then I think that he was no less acting as a muktear in what
 he did for the defendant, because he may have abstained in
 this particular case from doing any of those acts which a
 duly qualified muktear is alone legally capable of performing.
 This seems to me to constitute the difference between acting
 as a private agent and acting as a muktear. If a man holds
 himself out generally as ready to conduct cases for clients for
 reward, and makes this his public profession or calling, in the
 same way as a pleader or an attorney, then he cannot with
 propriety be considered a *private agent*.

Unless this is the proper view of the law, the Legal Practitioners' Act, whatever the intention of the Legislature may have been, must of necessity, so far as it relates to muktears, become a dead letter; and duly qualified muktears will be deprived of their legitimate profits and privileges by men who have no right to practise in the Courts as muktears at all. In that case it is clear that either fresh Legislation is necessary or this Court must pass rules to define more particularly what "acting as a muktear" is to mean.

I should add that it has occurred to my learned colleague, Mr. Justice Mitter, that s. 13 appears to apply to those persons only who are qualified and enrolled as muktears, but who have practised as muktears without obtaining their certificates. The language of s. 13 does certainly seem to afford some ground for this view; and yet it would seem an absurdity that a man, who is duly qualified and enrolled as a muktear, and who has only neglected to take out his certificate,

should be subject to penalties, and disabled under that section from suing for his fees; whilst a man who is neither qualified nor enrolled as a muktear, nor certificated, should be enabled to recover his fees, and be subject to no penalties. It is difficult to conceive that this could have been the intention of the Legislature.

But whatever may be the meaning of s. 13, s. 5 of the same Act appears to me to remove all difficulty, and to debar the present plaintiff, if he has really acted as a muktear, from the right to enforce his present claim. Section 5 enacts that "no person shall appear or act as a muktear, &c., unless he shall have been admitted and enrolled, and otherwise duly qualified to practise as a muktear, &c." The plaintiff, therefore, if he practised as a muktear when acting for the defendant, did an act which is expressly forbidden by the Legislature; and I take it to be clear, as a matter of law, that he cannot recover his fees for doing such an act. See the case of a broker suing for his fees without being licensed—*Cope v. Rowlands* (1), and of an appraiser suing for work done without being licensed—*Palk v. Force* (2).

I think, therefore (having regard to the foregoing observations), that in order to decide this case properly, the learned Judge in the Court below should be directed to ascertain whether the plaintiff, when acting for the defendant, was a private agent of the defendant, or a person who practises generally for reward in Courts of law as a muktear. But as my learned brothers are disposed to take a different view of the matter, the judgment which has been passed for the plaintiff must stand.

(1) 2 M. and W., 149.

(2) 12 Q. B., 666.

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APPELLATE CIVIL.

*Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice White, and
Mr. Justice Miller.*

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KALLY SOONDERY DABIA v. HURRISH CHUNDER CHOWDERY.

*Appeal—Order by Judge of the High Court presiding over the Privy Council
Department—Letters Patent, s. 15—Judgment—Certified Copy of Order
of the Privy Council—Civil Procedure Code (Act X of 1877), s. 610.*

A decree obtained on appeal by certain defendants in the High Court, was appealed to the Privy Council by one only of the two plaintiffs to the suit, and the decision of the High Court was reversed; the plaintiff who had appealed assigned her share in the order of the Privy Council to one of the defendants, and delivered him the certified copy of the decree made in the Privy Council. The plaintiff who had not appealed to the Privy Council applied to the High Court for leave to transmit the order to the Court of first instance for execution of the share decreed to him, but on account of the assignment abovementioned, was unable to produce the certified copy of the decree of the Privy Council. The Judge presiding over the Privy Council Department in the High Court held, that the production of a certified copy of the order of the Privy Council was excusable under the circumstances, but refused the application, on the ground that the decree of the Court of first instance, which was affirmed by the Privy Council, could only be executed as a whole and not partly by one of the plaintiffs.

Held on appeal per GARTH, C. J.—That the duties of a Judge in dealing with the meaning of decrees of the Privy Council are purely ministerial, and that any order made in such ministerial capacity could not be considered a judgment, and could not, therefore, be made the subject of an appeal to a Bench of the High Court under s. 15 of the Charter (1).

Per WHITE and MITTER, JJ.—An order of a Judge presiding over the Privy Council Department in the High Court, rejecting an application for execution, is a final order, and is a judgment within the meaning of s. 15 of the Charter, and is therefore appealable.

ONE Shumbhu Chundra Chowdry, by a sanad in 1226 B. S. (1820), granted a shikmee talook, comprising three mou-

* Appeal under s. 15 of the Letters Patent from an order of Mr. Justice Pontifex, dated the 27th February 1880, made on an application by the appellant in Privy Council Appeal, No. 5 of 1876.

(1) See *Mowla Buhsh v. Kishen Pertab Sahi*, 1 L. R., 1 Cal., 102.

zas, to his sister, one Kassisiwari Dabia (1). Kassisiwari had a son, the husband of the appellant, who pre-deceased her. On the 3rd Assar 1272 (16th June 1865) Kassisiwari died, and by her will left the above properties to her daughter, Chundra Moni Dabia, and the adopted son of Sreemuty Kally Soondery Dabia equally. Kassisiwari died on the 20th Bhadoor 1278 B.S. (corresponding with 4th September 1871), whereupon one Kassi Kissory Roy and one Hurrish Chunder Chowdry took possession of the property, alleging that the sanad only conferred on Kassisiwari a life-interest in the property. Chundra Moni Dabia, and Kally Soondery Dabia on behalf of her adopted son, on the 16th January 1873, brought a suit to recover possession of the property and for mesne profits under the sanad and will before mentioned.

The Subordinate Judge held that the sanad and the will were valid, and gave a decree in favor of the plaintiffs. The defendants appealed to the High Court, and the learned Judges (BIRCH and MORRIS, JJ.) decided, reversing the decree of the lower Court, that, upon the right interpretation of the sanad, the gift to Kassisiwari was a gift of a life-interest only, and that, therefore, she had no right to dispose of the property by will. In March 1876 (Chundra Moni Dabia being dead) Bhoobun Mohini Dabia and Hurro Kinkurry Dabia, her daughters, who had been substituted for her on the record, applied and obtained leave to appeal to the Privy Council; Kally Soondery Dabia, the mother and guardian of Shurut Chundra Lahiri, did not join in the appeal. On the appeal being heard, their Lordships of the Judicial Committee reversed the finding of the High Court, finding that the sanad of 1226 (1820) gave to Kassisiwari an absolute estate, and as such she could dispose of it under her will: their Lordships, however, declined to decide the rights of the plaintiffs *inter se*. Hurro Kinkurry Dabia, while the appeal was pending, purchased the right, title, and interest of her co-appellant in the properties in question, and on the 4th January 1880, Hurro Kinkurry, not having taken out execution of the Privy Council order, sold her right and

(1) The words of the gift are set out in the case as reported in L. R., 5 I. A., 138, and I. L. R., 4 Calc., 23.

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interest in the subject-matter of the suit to Hurrish Chunder Chowdhry, and made over to him the certified copy of the decree made on appeal to the Privy Council.

On the 13th May 1880, Kally Soondery Dabia, on behalf of her adopted son, applied to the High Court for execution of the order of the Judicial Committee.

Mr. *Phillips* for the applicant.

The *Advocate-General* (Mr. *Paul*) for Hurrish Chunder Chowdry.

The Judge in the Privy Council Department of the High Court, PONTIFEX, J. (after stating the facts), continued:—
“The party who did not appeal having applied to execute the decree has been met with two objections: the first, under s. 610 of Act X of 1877, that this application could not be granted, because it was not accompanied by a certified copy of the decree of Her Majesty in Council; but the defendant himself has got that certified copy of the decree, and I think the objection under s. 610 cannot be sustained. The other objection to the execution of the decree of the Privy Council was, that the decree of the original Court upheld by the Privy Council could only be executed as a whole, and not by one of the two plaintiffs. Mr. *Phillips* relies on s. 231 of Act X of 1877. Now the two plaintiffs claim under a will which is not free from difficulty. The Privy Council decline to construe the will as between the two plaintiffs claiming under it. I think, therefore, I must refuse the application for execution, and the applicant must be left to a regular suit to enforce her claim to any share of the property, but I do so without costs.

From this decision Kally Soondery Dabia Chowdrain appealed under s. 15 of the Letters Patent.

The *Standing Counsel* (Mr. *J. D. Bell*) for the appellant.—
The Judge ought to have ordered the decree to be executed by the Court below under s. 231 of Act X of 1877, at the same time ordering the protection of the rights of the other decree-holders. If the judgment now appealed against is sound, a defendant could, by purchasing the right of one out

of several successful plaintiffs, do away with the good obtained by the decree. *Indro Coomar Doss v. Mohinee Mohun Roy* (1) lays down the proper procedure where one of several decree-holders wishes to execute his decree, but I can find no case which would serve as a precedent where one of several plaintiffs sells his rights. See however the notes to s. 238 in Mr. O'Kinealy's Code of Civil Procedure—I rely on ss. 231 and 539 of Act X of 1877.

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The *Advocate-General* (Mr. Paul) for the respondent.—There is no appeal from an order of a Judge sitting on matters connected with the Privy Council, refusing or allowing an appeal: *Amirrunnessa v. Behary Lall* (2). Further, s. 610 of Act X of 1877 lays down that the applicant for execution must have in his possession a certified copy of the order of the Privy Council. The applicant in the present case has not such a certified copy, the only certified copy is with us; and inasmuch as the applicant was not a party to the appeal to Her Majesty, she cannot obtain one; her only remedy is to bring a regular suit for a declaration of her rights under the will. The remarks made in *Joynarain Giree v. Goluck Chunder Mytee* (3) apply to this case. [GARTH, C. J.—In replying Mr. Bell, we wish you to confine yourself to the question as to whether or no we have jurisdiction. The order seems to be ministerial; can you call it a judgment? and if it is not a judgment within the meaning of s. 15 of the Letters Patent, it is not appealable.]

The *Standing Counsel* (Mr. J. D. Bell) in reply referred to Macpherson's Judicial Committee Practice, p. 147. [GARTH, C. J.—But see s. 19 of Act VI of 1874, the word “enforcement” is not used in reference to the High Court; and the order made by the High Court cannot be considered a judgment, but merely a direction as to the Privy Council order.]

MITTER, J. (after stating the facts down to the decision of the Privy Council, continued).—Hurro Kinkurry Dabia, on the 4th January 1880, conveyed away to the respondent her

(1) 15 W. R., 159.

(2) 25 W. R., 529.

(3) 20 W. R., 444.

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right, title, and interest in the subject-matter of the suit, &c., and made over to him the certified copy of the decree made in appeal to the Judicial Committee. Previously, however, she had produced this certified copy in this Court, when she made an application in the matter of security for costs which she had given in the Privy Council appeal proceedings. A copy of this certified copy of the final decree of the Privy Council is on the record of this Court.

The appellant before us then made an application to this Court setting out all these facts, to be allowed to execute the decree of the Court of first instance as restored and affirmed by the Judicial Committee of the Privy Council. The respondent raised two objections,—first, that the application was not accompanied by a certified copy of the decree of Her Majesty in Council, as it should have been under s. 610 of the Civil Procedure Code; and secondly, that the appellant, under the peculiar circumstances of the case, ought not to be allowed to execute the decree, until she establishes her rights to a share in the property in dispute in a regular suit instituted for that purpose. The learned Judge of this Court, before whom this application was brought on for hearing, being of opinion that there was no force in the first objection, inasmuch as the defendant himself was in possession of the certified copy in question, disallowed the application upon the second objection. Under s. 15 of the Letters Patent, this appeal has been preferred against that decision. A preliminary objection has been taken to the hearing of the appeal, on the ground, that an order passed under s. 610 of the Civil Procedure Code is not a judgment within the meaning of s. 15 of the Letters Patent, and is therefore not appealable.

I am of opinion that this objection is not tenable. In the first place, whether the function of this Court under s. 610 be judicial or not, the learned Judge who has disposed of the appellant's application under that section has passed a decision disposing it of judicially, considering that, under that section, this Court has no judicial discretion to exercise, but is bound to transmit the order of Her Majesty to the Court which made the first decree, yet that was not done in this case. The learned

Judge who heard that application has exercised his judicial discretion under s. 231 of the Civil Procedure Code, and the order passed by him is therefore a judgment within the meaning of s. 15 of the Letters Patent, and is accordingly subject to appeal.

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It has been said that this Court has no jurisdiction under s. 610 to decide any question between the parties, and that as the learned Judge who disposed of this application has assumed a jurisdiction not vested in him, his order is not open to appeal in the same way as any other order passed in strict conformity with that section. Assuming that the order which is the subject of this appeal is not in accordance with s. 610 (which is by no means clear to me), yet, it being a judgment by which the learned Judge, in the exercise of his judicial discretion, refused the prayer of the appellant, is, in my opinion, appealable under s. 15 of the Letters Patent; see *Dyebukee Nundun Sen v. Mudhoo Mutty Goopta* (1).

The next question is whether, under the circumstances of this case, the appellant is entitled to an order from this Court under s. 610 transmitting the decree of Her Majesty to the lower Court to execute and enforce it. It is true that the certified copy of the decree which the appellants to Her Majesty's Privy Council obtained is not in the record, and cannot, therefore, be transmitted; but a copy of that certified copy is on the record, and the copy itself is in the possession of the respondent. Under these circumstances, the learned Judge in this Court was of opinion, that the appellant had sufficiently complied with the provisions of s. 610. No appeal has been preferred against this ruling. We cannot, therefore, re-open this question. Besides, it seems to me that there may be cases in which great injustice would be done, if it were to be held that, under no circumstances, would this Court transmit a copy of a certified copy of the decree of the Privy Council under s. 610. Suppose the certified copy obtained by a party is lost for no fault, negligence, or laches on his part, and it is impossible for him to obtain another certified copy from England within the time allowed by law to execute the decree, would the decrees-

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holder be entirely without any remedy? It would be unjust to hold so. But be that as it may, in the absence of any cross-appeal on the part of the respondent, we are bound to accept upon this point the ruling of the learned Judge who disposed of the appellant's petition under s. 610 in the first instance.

That being so, it seems to me that there does not exist in the circumstances of this case any sufficient reason which would warrant us in refusing the appellant's prayer. It is true that the decree was passed jointly in favour of the appellant as well as Chunāra Moni, whose interest probably is now vested in the (defendant) respondent. Because the appellant's co-plaintiffs chose to convey their interest to the defendant, it does not follow that she should be left to have her rights determined in a regular suit. Suppose out of 100 persons, jointly holding a decree, one of them, whose interest is very small, were to assign it over to the defendant, would it be just to drive the remaining 99 persons to a regular suit to have their shares determined? Besides, I do not see why the Court executing the decree should be held incompetent to determine the question of shares, under cl. (e) of s. 244 of Act X of 1877, with as much facility and finality as the same Court in a regular suit. The defendant says, that since the decree was passed, he has acquired the interest of one of the joint decree-holders. The question that then arises between him and the remaining decree-holder is one that seems to me to come both within the spirit and letter of cl. (e) of s. 244 of Act X of 1877—see *Wise v. Moulvie Abdool Ali* (1). I would, therefore, grant the prayer of the appellant, and direct the Privy Council decree in question to be transmitted to the Court which made the first decree to be executed according to the provisions of s. 610 of the Code of Civil Procedure.

WHITE, J.—This is an appeal against an order of the learned Judge in the Privy Council Department refusing the application of Kally Soondery Dabia, as guardian of her infant son, Shurut Chunder Lahiri, to transmit for execution by the Court of first instance a decree made by Her Majesty in Council.

Kally Soondery Dabia's infant son is one of the plaintiffs in the suit which terminated in that decree, Hurro Kinkurry Dabia being the other plaintiff, and the decree of Her Majesty in Council reversed the decree of the High Court and affirmed that of the Subordinate Judge of Mymensing of the 10th of March 1874, which ran in these words—"that the plaintiffs do recover from the defendant possession of the disputed mouza."

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The application was made by petition, but not accompanied by a certified copy of the decree of the Privy Council as required by s. 610 of the Code. The petition stated that the certified copy was in the possession of the defendant; and in explaining how this came to be, disclosed that, since the decree of the Privy Council had been made, the co-plaintiff, Hurro Kinkurry Dabia, had sold to the defendant, by a deed of sale dated the 4th January, her right, title, and interest in the subject of the suit, and had handed to him the original order of Her Majesty in Council.

The learned Judge held, that the production of the certified copy was excused under the circumstances, but refused the application on the ground that the decree of the Original Court, which was affirmed by the Privy Council, could only be executed as a whole, and not partly by one of the plaintiffs.

The first point to be considered is, whether an appeal lies against the order complained of. The order is made by a single Judge appointed to dispose of all matters relating to appeals to Her Majesty in Council. The delegation is made under Rules of this Court, which are authorised by the Charter Act, 24 and 25 Vict., c. 104, s. 13.

Section 15 of the Charter of 1865 gives an appeal against the judgment of a single Judge appointed in pursuance of s. 13 of the Charter Act.

What constitutes a judgment within the meaning of this section was well considered in the *Justices of the Peace for Calcutta v. The Oriental Gas Company* (1). Couch, C. J., giving the judgment of himself and Markby, J., says:—"We think that 'judgment' in cl. 15 means a decision which affects the merits of the question between the parties by determining

(1) 8 B. L. R., 433.

1881 some right or liability. It may be either final or preliminary
 IN THE MAT- or interlocutory, the difference between them being that a final
 TER OF THE judgment determines the whole cause or suit, and a prelimi-
 PETITION OF nary or interlocutory judgment determines only a part of it,
 KALLY SOON- having other matters to be determined." In the same judgment
 DERY DABIA. the Chief Justice, in dealing with an argument based on the
 fact that an appeal is entertained in cases where a plaint is
 rejected, remarks, "there is an obvious difference between an
 order for the admission of a plaint and an order for its rejection.
 The former determines nothing, but is merely the first
 step towards putting the case in a shape for determination. The
 latter determines finally, so far as the Court which makes the
 order is concerned, that the suit as brought will not lie. The
 decision, therefore, is a judgment in the proper sense of the
 term."

The order now under appeal appears to me to have the characteristics which are noticed in the above judgment. It is an order for rejection. It decides that, for the reason stated in the order, the applicant is not entitled to have the decree of the Privy Council executed. It determines her right to have execution; and the determination, so far as the Court passing the order can make it, is final. That being so, I am of opinion that the order is "a judgment" within the meaning of s. 15 of the Charter, and is therefore appealable.

On the merits, I am of opinion, that the order cannot be sustained. The duties thrown upon the Court by s. 610 are in a large measure ministerial only. No doubt, the Court must ascertain in the first instance, whether the applicant is the party, or if the original party is dead, the legal representative of the party in whose favor the decree of the Privy Council is made; but when that is proved, the Court is bound to transmit the decree to the Court of first instance for execution, and has nothing further to do, unless one or other of the parties applies for special directions respecting the enforcement or execution of the decree, when the Court is to give such directions as may be required.

In the judgment passed in the present case, the lower Court appears to me in the first place to have travelled outside s. 610

of the Code, and in the next place to have come to an erroneous conclusion that the decree could only be executed as a whole.

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The application was, unquestionably, made on behalf of a party to the decree, though not the sole party, and by reason of the sale which had taken place subsequent to the decree, and so vested the interest of his co-plaintiff in the defendant, he was really the only party to the decree who could apply under s. 610 for its execution. Under these circumstances, I think the learned Judge ought to have transmitted the decree for execution to the Court of first instance, and left it to that Court to determine, in the course of execution, the questions which have arisen between the defendant and the applicant in consequence of the purchase by the former of the interests of the co-plaintiff. Clause 6 of s. 244 of the Code is, in my opinion, wide enough to permit of these questions being so determined. They are questions relating to the execution of the decree or to its satisfaction and discharge, and they have arisen in consequence of the defendant dealing with one of the plaintiffs since the decree. The effect of the purchase of that plaintiff's interest is to satisfy the decree and discharge it to the extent of that interest.

I do not think that the applicant, who has retained his interest, ought, as suggested by the learned Judge, to be left to bring a regular suit against the defendant in order to determine his share. To hold otherwise would be, in the case of all decrees which have passed in favor of several plaintiffs, to put it in the power of a defendant, by persuading one of the plaintiffs to sell to him his interest, however small, in the decree, to defeat the execution of the decree and compel the remaining decree-holders to encounter the expense, delay, and hazard of another suit, when they were on the eve of reaping the fruits of their success at the end of a protracted litigation.

It was decided by Loch and Macpherson, JJ., in *Wise v. Moulvie Abdool Ali* (1), that where one of several plaintiffs had died after decree, the fact that by his death a share in the property, the subject of the suit, had devolved upon one of the

1881 defendants, did not prevent the execution of the decree by the surviving plaintiffs, and that the latter were from that circumstance alone not compelled to bring a separate regular suit. This case was decided in 1868. The present Code, as amended in 1879, has enlarged the questions arising between parties to a suit which may be determined in the course of executing a decree. In the case cited, the devolution was by operation of law in consequence of the death of one of the plaintiffs, but the sale by the co-plaintiff in the present case and the purchase by the defendant were unknown to the co-plaintiff, and were really as much beyond the control and without the co-operation of the applicant, as the devolution by the operation of law was beyond the control of the co-plaintiff in the case cited. The result too was the same, *viz.*, that the decree could not be executed to the extent of the interest which had vested in the defendant.

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As no appeal has been preferred by the defendant against that part of the order which dispensed with the production by the appellant of a certified copy of the Privy Council decree, it is unnecessary to consider the propriety of the order in this respect.

The result is that I would set aside the order appealed against, and order that the decree be transmitted to the Court of first instance for execution.

It is a peculiarity in this case that the applicant did not join in the appeal to the Privy Council which terminated in the restoration of the decree of the First Court, but I think that that circumstance makes no difference, as the Privy Council, by restoring that decree, have in effect given a joint decree in favor of both the plaintiffs.

GARTH, C. J.—The point in this case upon which I am unable to agree with my learned brothers is as to whether we have jurisdiction to entertain this appeal.

It appears to me, that, having regard to the provisions of s. 610 of the Civil Procedure Code, the duties of the High Court in dealing with decrees of the Privy Council are purely ministerial; and that any order which the Judge of the Privy Council Department may make, when acting in a ministerial

capacity, cannot properly be considered as "a judgment," and consequently cannot be made the subject of appeal to a Bench of this Court under s. 15 of the Charter.

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It is said that the duties of the High Court under s. 610 are not altogether ministerial; and that it may become necessary for the Judge, acting under that section, to determine certain questions judicially; as for instance, if two persons presented themselves, each claiming to be entitled to the benefit of a Privy Council decree, it would be the duty of the Judge to decide which of those persons was really so entitled. But even in such a case, I consider that the High Court would have no power to decide between the contending parties. The question, who is entitled to the benefit of the decree, is one which, in my opinion, should either be decided by the Privy Council, or by the Court whose duty it is to execute the decree.

If, as in the present case, the person claiming the benefit of the decree was no party to the appeal to the Privy Council, and there were any question, whether, having regard to the true meaning of the decree, the claimant was entitled to take advantage of it, I consider that that the Privy Council, who made the decree, would best understand its meaning, and would be the proper Court to determine that question.

But if, on the other hand, the question did not depend upon the meaning of the decree itself, but upon something which had happened subsequently, as for instance, if the decree-holder had died, and the question was, who was his representatives, or if the decree-holder had assigned his interest, and the question was between the assignee on the one hand and the heirs of the decree-holder on the other, this would be a question which, under s. 210 of the Code, would have to be determined, as in other cases, by the Court which executes the decree; and having been determined there, might be made the subject of appeal to the High Court.

But the High Court, in my opinion, is neither the proper Court to put a construction upon the decree, nor to determine questions which would, in the ordinary course, have to be decided in the execution-proceedings. The High Court has merely to transfer the decree for execution to the Court below; and I

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think that s. 610 has specially provided a means of notifying to the High Court the person or persons in whose favor, and upon whose application, the decree should be so transferred.

The person who applies must do so by petition, and this petition must be accompanied by a certified copy of the decree or order which is sought to be executed. That certified copy can, of course, only be obtained at the Privy Council Office; and if any one applies for it other than the decree-holder, I presume the question whether he is, or is not, entitled to a copy, would have to be determined by their Lordships of the Privy Council.

When, therefore, the petitioner produces to the High Court a certified copy of the decree, that Court has then, and not till then, as I conceive, the duty thrown upon it of transferring the decree to the lower Court for execution; and it has no discretion, in my opinion, to refuse to perform that duty. The production of the certified copy is a sufficient warrant to the High Court that the party producing it is entitled to ask to have the decree executed; and the language of the section is imperative, that, upon its production, *the High Court shall transfer* the decree for execution.

In this particular case the party applying did not produce a certified copy of the decree, and the learned Judge thought it right to dispense with the production of it, because a certified copy had been produced by one of the other parties to the proceeding. I confess, I doubt very much whether this was right. I think, for the reasons which I have just now explained, that the certified copy is not merely intended to satisfy the High Court that the decree exists, but that the person who applies for execution is entitled to the benefit of it. And this case affords a good illustration of the convenience and propriety of such a provision; because here the applicant was no party to the appeal to the Privy Council; he had paid no share of the costs; and if he had applied to the Privy Council for a certified copy of the decree, their Lordships might, with good reason, have refused to allow him to share in the benefit of the decree, until he had paid or given security to his co-plaintiff for his share of the costs.

I would, however, decide this appeal solely upon the ground that we have no jurisdiction to hear it. I think that if this Court or any other Court *has a mere ministerial duty to perform*, and refuses to perform it (no matter for what reason) the order or act of refusal can no more be considered as “a judgment” than could the order of the Court made ministerially in compliance with that duty; and it is not because the learned Judge of the Privy Council Department has in this case acted *ultra vires* in determining the right of the parties, and has usurped, as I consider, a jurisdiction in that respect which he does not possess, that we have any right to usurp a jurisdiction also, and to treat his decision as “a judgment” which may be reviewed in appeal under s. 15 of the Charter. If any Court subordinate to the High Court were to usurp a jurisdiction in a similar way and to refuse to perform some ministerial act, the High Court, in my opinion, could not confer upon itself right to review the decision of the subordinate Court by way of *appeal*. Its proper course would be to set aside the decision and to order the subordinate Court to do its duty either under s. 15 of the High Courts Act or s. 622 of the Civil Procedure Code.

In such a case as this, it seems to me that the Privy Council is the only proper tribunal to rectify the order of Mr. Justice Pontifex. But I cannot regret that my learned brothers have come to a different conclusion, because it is no doubt more convenient that the mistake which we all agree, has been made should be rectified here, instead of putting the parties to the trouble and expense of applying to the Privy Council. If it were merely a question of convenience, I should certainly have agreed with the other members of the Court; but as I consider it a question of principle, by the decision of which we must be guided in other cases, I feel compelled, for the reasons which I have given, to dissent from their judgment.

Appeal allowed.

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*Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice White, and
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*Right of Private Ferry—Easement—Limitation Act (IX of 1871), s. 27—
User for Twenty years.*

The right of establishing a private ferry and levying tolls is recognized in British India.

Per GARTH, C. J., and WHITE, J.—Twenty years is the shortest period within which such a right of ferry can be established by user.

Per MITTER, J.—Where the existence of a private right of ferry plying between the lands of *A* and *B* is admitted by *B*, no question of user arises; the issue that is raised between the parties is not whether a private ferry exists, but whether the recognized private ferry which is in existence is the property of *A* or *B*: but *semble*, supposing such question of user to arise, a right of private ferry cannot be established as an indefeasible right by long user.

THE plaintiffs in this case claimed, as a matter of private property, an exclusive right of ferry across the river Nun, from their own ghat to the ghat of the defendant, which right they stated had existed in their ancestors, themselves, and their ticcaddars for more than a hundred years; and further claimed the right to take toll from passengers, and sought to exclude the defendant from interfering with their profits by exercising a similar right of ferry.

The defendant denied the plaintiffs' right, and set up a right similar to the alleged right of the plaintiffs as belonging to himself.

The Munsif found that there was no evidence of user on the part of the plaintiffs for twenty years as required under Act IX of 1871, s. 27, and dismissed the suit, refusing to hear some of the plaintiffs' witnesses.

* Appeal from Appellate Decree, No. 850 of 1879, against the decree of Baboo Ram Pershad, Second Subordinate Judge of Mozufferpore in the district of Tirhoot, dated the 16th December 1878, reversing the decree of Baboo Ramyad Lall, Munsif of Tajpore, dated the 5th October 1877.

The plaintiffs appealed to the Subordinate Judge, who reversed the decision of the Munsif, and found that the plaintiffs had collected the ferry charge on both sides of the river, and had been in possession "*for a long time*," but did not find the duration of the possession.

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The defendant appealed to the High Court. The appeal was first heard by Garth, C. J., and Mitter, J., who differed in opinion, and the case was accordingly reheard before three Judges under the provisions of s. 575 of the Civil Procedure Code.

Baboo *Anoda Pershad Banerjee* for the appellant.

Mr. *R. E. Twidale* for the respondents.

The following judgments were delivered:—

GARTH, C. J.—The plaintiffs in this case claim an exclusive right of ferry across the river Nun, from their own ghat in Mouza Buch on the eastern side of the river, to the ghat of the defendant in Mouza Kistwara Fakir on the western side of the river. They claim not only the right to carry passengers by this ferry, and to take tolls from them, but also to exclude the defendant from interfering with their profits by exercising a similar right of ferry on the western side of the river. This right is claimed by the plaintiffs as a matter of private property, and they say that the defendant has interfered with their alleged right by ferrying passengers across the river in an ekta boat and taking tolls from them.

The defendant denies the plaintiffs' alleged right, and sets up a similar right as belonging to himself; and the issues are intended to raise, and do raise in my opinion, the question, whether the plaintiffs are entitled to the right which they set up.

The plaintiffs have produced no grant or other document of title in support of their claim; but they have endeavoured to establish their right by proof of long user, and have brought forward some purwanas from the Foujdari Court, which they seek to use as evidence in their favor.

The Munsif apparently considered that, as the right claimed was in the nature of an easement, the plaintiffs, under s. 27 of

1881 the Limitation Act, were bound to prove a user of the right
 PARMESHARI for twenty years before suit. He found that the plaintiffs had
 PROSHAD given no evidence of the exercise of the right for twenty years,
 NARAIN and consequently he dismissed the suit.
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MAHOMED The Subordinate Judge considered that s. 27 of the Limita-
 SYUD. tion Act did not apply to the case; and he has found in favor
 of the plaintiffs, apparently upon the ground that the plain-
 tiffs' alleged right has been exercised and not interfered with for
 twelve years, and he has relied in support of his finding upon the
 proceedings in the Fouzdari Court, which took place at various
 times between the year 1865 and the commencement of the
 suit.

I confess, if the question had been *res integra*, I should have
 doubted whether such an extensive and exclusive right as the plain-
 tiffs claim is not illegal, as being contrary to public policy. But
 I find that such rights have long been recognized in this coun-
 try as private property, from times anterior to the Permanent
 Settlement, and I therefore forbear to throw any doubt upon
 their legal validity.

The only real question in the case then, as it seems to me, is
 as to the length of user which should justify the Court in presum-
 ing the existence of a right of this kind in favor of the plaintiffs.
 I think that it would clearly be improper and unsafe to leave
 it open to the subordinate Courts in this country to presume
 such a right from any number of years' user according to their
 own discretion. If this were the law, it would inevitably
 work unfairly, because different Judges might act upon a
 different rule according to their own notions upon the subject.
 It is not only right, as it seems to me, but in conformity with
 the law, both here and in England, that there should be some
 definite principle upon which all Civil Courts should act as to
 the period of prescription in such cases; and as the Indian Legis-
 lature, in conformity with the English law, has now prescribed
 twenty years as the proper period in the case of easements
 and profits *à prendre*, I think that, in conformity with that rule,
 it would be proper to consider twenty years as the shortest
 period within which a right of ferry can be established by user.

As my brother Mitter and myself were not agreed upon this

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point, the question has been referred to my brother White as a third Judge. We have heard the case argued again, and I am still of opinion that no such right as that which the plaintiffs claim ought to be presumed from a user of less than twenty years. As the Subordinate Judge has not dealt with the case upon this principle, and has apparently considered a twelve years' user sufficient to establish such a right, I think that the case should be remanded to him to determine whether the plaintiffs have proved an exclusive exercise of the right for at least twenty years.

It seems to me very doubtful whether, considering that this is a private right, the purwanas which have been admitted ought to be treated as evidence as against the defendant. We do not know what the purwanas are, or how far they can legally be made evidence; but as the case is to be remanded, I think it right to direct the attention of the Subordinate Judge, as well of the parties, to that point.

My brother White agrees that the costs of both hearings in the High Court, and also of the lower Appellate Court, should abide the ultimate result of the cause.

We are informed by the learned pleader for the plaintiffs that, in the Court of first instance, the plaintiffs were prepared to call eighteen witnesses in support of their case, and that the Munsif only allowed them to call twelve of those witnesses. This seems to have been made one of the plaintiffs' grounds of appeal to the Subordinate Judge, and Mr. Twidale contends, that, upon the case being remanded, the plaintiffs ought to have the advantage of that ground of appeal if they can make anything of it. If the plaintiffs can satisfy the Subordinate Judge upon affidavit, that the Munsif did really refuse to allow these witnesses to be called, and that their evidence was calculated to support the plaintiffs' case upon the point which we now direct to be tried, we think that the plaintiffs ought to have an opportunity of calling those witnesses before the Subordinate Judge. The defendant will, of course, be at liberty to answer upon affidavit any case which the plaintiffs may make as to the Munsif not allowing the witnesses to be called, and the Munsif himself may be referred to, if necessary, to ascertain the truth of the matter.

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WHITE, J.—I agree that the plaintiffs should have the opportunity of examining their further witnesses, provided they satisfy the Subordinate Judge as regards the particulars mentioned in the judgment of the Chief Justice.

The suit out of which this appeal arises is for the disturbance of a ferry claimed by the respondents. The relief sought is a perpetual injunction to restrain future disturbance and damages for past disturbance.

The ferry lies between two villages, which are separated by the river Nun. One of the villages, which is on the eastern bank, is called Buch, and belongs to the respondents. The other, which is on the western bank of the river, is called Kistwara Fakir, and belongs to the appellant.

In their plaint the respondents state that the ferry under the name of Buch Bhudunghat has existed for upwards of a hundred years, and that they and their ancestors have all along been in the enjoyment of the ferry, and by themselves, or their ticcadars, have received the charges for ferrying passengers over the river backwards and forwards between the two villages. The respondents claim the ferry by virtue of proprietary and prescriptive right. The claim of the respondents thus involves the exclusive right as against the appellant and the rest of the public to levy tolls from passengers passing from one village to the other by the ferry (Buch Bhudunghat), and also the right as against the appellant to use the western bank of the river for the purpose of embarking and disembarking passengers using the ferry.

The ferry is not claimed as a public ferry under Reg. VI of 1819, nor as established by sannad or grant from the ruling authority, but as a private ferry.

There appears to be nothing in the law which prevails in the mofussil of this Presidency to prevent any private person from establishing a ferry and levying tolls from those who use the ferry. The existence of such ferries is impliedly recognised in Reg. VI of 1819, and such recognition is affirmed by the late Sudder Dewany Adawlut in the case of *Rajiblochun Roy v. Kumri Bebee* (1); see also the case of *Kishoree Lall Roy v. Gokeol Monee Chowdhraim* (2).

(1) S. D. A., 1854, p. 153.

(2) 16 W. R., 281.

Now, as any man may set up a ferry over a river which passes between his own village and that of another riparian owner, no one who works such a ferry can exclude his neighbour from doing the like thing, unless the former has acquired a right of property in the working of his own ferry. This right may be acquired as against his neighbour by proving a grant from him or his predecessors in title, granting the right of embarking and disembarking passengers on his land, or it may be acquired, as against all the world, by proof of long uninterrupted user.

The respondents have produced no written or other evidence of a grant from the appellant or the former owners of Kistwara Fakir, but rely solely upon evidence, to the effect that they have, for a certain period of time, by themselves or their ticcadars, used ferry boats and collected the ferry charge on both the eastern and western sides of the river; in other words, they seek to prove what they call their "proprietary and prescriptive right" by long uninterrupted user.

The first Court found that there was no evidence of the user beyond sixteen years, and considered such evidence of user as there was to be unsatisfactory; and dismissed the suit, on the ground that the plaintiffs had not proved their right to the ferry. The lower Appellate Court reversed the decision of the first Court, and decreed the relief prayed. The Subordinate Judge finds that the plaintiffs have collected the ferry charge on both sides of the river, and have been in exclusive possession for a long time, but he does not find the duration of the possession.

The question raised by this appeal is, what must be the duration of the user to give the respondents a right to the relief which they ask? In my opinion it should be not less than twenty years. The respondents' claim, so far as it involves a right to embark and disembark passengers on the landing place in the appellant's village, is really a claim to an easement, or a right in the nature of an easement; and the Indian Limitation Act has prescribed for the acquisition of an easement a user of twenty years. Supposing a ferry could by English law be erected by a private person at his own will, and the proof of title to it depended upon long uninterrupted user, there can be no doubt that a user of twenty years would be required in order to make out

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title. There is nothing that I am aware of which makes a period of twenty years unsuited to the circumstances of the mofussil of this Presidency or its inhabitants. Long and uninterrupted possession or use by a claimant may be viewed as long continued acquiescence on the part of those who are entitled to interrupt or disturb the claimant. Why twenty years have been fixed by the English law as the period to which the user must extend is not easy to say, and I have not been able to discover; but there is a good reason for a lengthened period to be found in this, that it affords ample time for those interested in preventing the acquisition of a right, to interfere and resist. It also allows for the supineness of individuals, and for the numerous hindrances to interference and disturbance which may arise from minority, absence, and other temporary causes.

It has been argued that it should be left to the Judge who presides at the trial to decide from the circumstances of each case whether the user has been of sufficient duration to confer an absolute and indefeasible right; but that course would, besides being at variance with the ordinary principles of law which regulate the acquisition of rights by user, be productive of the greatest uncertainty and inconvenience.

It has also been contended that a twelve years' user should be deemed sufficient, inasmuch as the Indian Legislature has fixed that period as the limit for a suit to recover immoveable property. But the argument founded on this circumstance fails, for the Legislature has by the same Act prescribed twenty years as the time for the acquisition of easements and certain profits *à prendre*, and there is a much closer analogy between such rights and the right claimed in this action than between the latter and immoveable property. In fact the mode in which the Legislature has dealt with easements furnishes an affirmative argument in support of the longer limit which I have mentioned.

No decision has been cited for the respondents which shows that the right which the respondents claim can be acquired by user within a less period than twenty years.

A case, however, has been referred to—*Joy Prokash Singh v. Ameer Ally* (1), decided in the year 1868—in which Peacock,

C. J., after referring to the English Prescription Act, says,—
 “That Act, however, does not apply to the mofussil here, and there is no magic in the number 20. I am inclined to think that by analogy to the Indian Limitation Act, an adverse and uninterrupted use of an easement for twelve years would confer a right to it. But it is premature to decide the point in this case. The point has not been argued.” This expression of opinion is admittedly an *obiter dictum*. The Indian Legislature has since definitely fixed the period for the acquisition of an easement at twenty years, and thus adopted the English law on the subject.

It is true that there is no magic in the number 20, nor is there indeed in the number 12 or any less number. But some limit of time must be fixed.

By the old Roman law a title to immoveable property on Italian soil was acquired by use (*usucapione*), if held for two years. This was altered by Justinian, who published a constitution, by which, throughout the empire, twenty years in the case of absent parties, and ten years in the case of those present, were fixed as the period of possession that must elapse before the use or possession was clothed with the title (Inst. Justinian, Lib. 2, Tit 6). The French Civil Code prescribed thirty years for the acquisition of an easement, as also did the law which prevailed in the mofussil of Bombay before the Indian Limitation Act of 1871; see *Anaji Dattushet v. Morushet Bapushet* (1). These periods are no doubt more or less arbitrarily fixed. It will not be contended that this Court is to apply Roman or French or any other foreign law. There is no Indian Law either legislative or judge-made which meets the case. What period then can this Court declare to be the proper limit except that prescribed by the English law in similar or analogous cases?

My brother Mitter, whose judgment I have had the advantage of perusing, is of opinion that the duration of user is not a question which arises in the suit, inasmuch as the existence of a private ferry plying between the respondents' and appellant's villages is admitted by the latter. But I cannot agree in this view. The mere existence of a private ferry, though admitted

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by the appellant, cannot entitle the respondents to the relief prayed, unless the respondents are entitled to prevent the appellant from using his own boats to carry passengers from the landing place in his own village across the river.

The respondents cannot be so entitled, unless they themselves have the absolute and indefensible right to use the landing place in question to the exclusion of the appellant; and to have acquired that right, they must have used the ferry without interruption for so many years as the law declares to be sufficient for the acquisition of the right.

The issues also which were framed in the first Court, in my opinion, clearly raise the question of right. Part of the first issue is, what right the plaintiffs have, and part of the second issue is, "whether the plaintiffs are entitled to recover the damages claimed or not?" The judgment too of the first Court, which dismissed the suit, proceeded upon the failure of the plaintiffs to prove a user of sufficient length to establish the right which they claimed.

The lower Appellate Court in effect narrowed the issues to this one,—“whether the plaintiffs had collected the ferry charge on both the western and eastern sides of the river, or had only collected the ferry charge of the ghat on the eastern side.” In so doing, I think the lower Appellate Court erred. It overlooked the essential point on which the plaintiffs' claim to relief depended,—viz., the proof of an exclusive and absolute right to the ferry in themselves.

On the whole, I am of opinion that the decree of the lower Appellate Court must be reversed; but as the importance of the duration of the user of the ferry escaped the attention of that Court, I am not unwilling that the case should be sent back to the lower Appellate Court with a direction to find specifically on this point, and upon the terms mentioned in the judgment of the Chief Justice.

MITTER, J.—The plaintiffs' case is, that they have the exclusive right of ferry across the river Nun between these villages, and the defendant having interfered with their right by setting up an opposition ferry from his side of the river, the suit has been brought virtually to restrain him (the defendant) from disturbing the plaintiffs' right.

The defendant does not deny that there is a private ferry in existence by which passengers are taken from one mouza to the other, and *vice versa* ; but he alleges that that right belongs to him as the proprietor of Mouza Kistwara Fakir.

The Munsif dismissed the suit, but on appeal the Subordinate Judge has awarded a decree in favor of the plaintiffs. The defendant has preferred this appeal, and the first question that has been raised before us is, whether, by the laws of this country, a private individual can claim a right of this nature—a right which entitles him, to the exclusion of the other members of the State, to ferry across a river within a particular area all passengers, receiving tolls from them.

Whatever may be the origin of this right, it is clear from the legislative enactments on the subject of “ferry ghats” framed from time to time, that such right exists in this country.

The earliest Regulation on the subject is No. XIX of 1816, of which ss. 2, 8, 9, and 15 bear upon the subject under consideration. Section 2 classifies ferries into three divisions,—*first*, ferries which are to be let in farm ; *second*, ferries held under khas management of the officers of Government ; and *third*, ferries held by private individuals without payment of revenue. Section 8 empowers the Revenue Authorities to reduce or enlarge “the number of ferries of every description, either of their own accord or at the suggestion of the Magistrate.” Then s. 9 lays down that “in the event of its appearing that the profits derived from any resumed ferry may have been included in the permanent assessment of the estate to which it has heretofore been annexed, the Board or Commissioner under whose orders the inquiry may be conducted shall report the circumstances, with an opinion on the merits of the claim, for the consideration and orders of the Governor-General in Council ; and the Courts of Judicature shall not take cognizance of any claims to deductions or compensation on account of the tolls levied at any ferry or ghat.” Section 15 enacted that the employing of a boat for the purpose of ferrying passengers, &c., by an *unauthorized* person would subject him to a fine, &c.

This Regulation was repealed by Reg. VI of 1819, of which ss. 3, 5, 6, and 13 define the distinction between public and private ferries.

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The latest enactment on the subject is Beng. Act I of 1866, s. 4, which clearly recognizes the right of *private* ferry; see also the case of *Government v. Brij Soondree Dasse* (1), *Rajib-lochun Roy v. Kumri Bebee* (2), *Kishoree Lall Roy v. Gohool Monee Chowdhraïn* (3), and *Narain Singh Roy v. Nurendro Narain Roy* (4).

But although the enactments referred to above recognise the right of private ferry in this country, they do not throw any light as to its origin.

But it seems to me that a right of this nature must, in some way or other, originate from the sovereign authority. In the course of the argument of this appeal, it was contended that, in this case, the right in question is claimed by the plaintiffs on the ground that it was acquired solely by prescriptive user for a certain length of time; and one of the questions raised before us is, what is the shortest period during which the user must be proved to entitle the plaintiffs to a decree? In this case it seems to me that the existence of a *private* ferry plying between the plaintiffs' and the defendant's mouzas is admitted. Therefore the question mentioned above does not really arise. The issue that is raised between the parties is not whether a *private* ferry does exist in the river Nun between the two mouzas, but whether the *recognized* private ferry, which is in existence there, is the property of the owner of Mouza Buch or of that of Mouza Kistwara Fakir. It is clear from the plaint and the written statement, as well as the evidence given by the contending parties, that the existence of a *private* ferry in the river Nun between the plaintiffs' and the defendant's villages is admitted.

The plaintiffs' witnesses deposed that the tolls from the passengers using this ferry were exclusively collected by the plaintiffs, while those of the defendant deposed they were exclusively received by the latter. The first issue framed by the Munsif is in these words: * Whether the plaintiffs or the defendant used to take the ferry charge of the ghat on the river Nun? What right the plaintiffs have? If the plaintiffs used to take the ferry charge, whether the defendant can be restrained from

(1) 7 Sel. Rep. 497.

(3) 16 W. R., 281.

(2) S. D. A., 1854, p. 153.

(4) 22 W. R., 296.

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taking it or not?" The first branch of this issue raises the only *question of fact* upon which the parties are disagreed. There is no other question of fact upon which the parties are at issue. The remaining portion of the first issue substantially raises the same question of *law* which has been first argued before us,—*viz.*, whether the right of private ferry is recognized by the laws of this country. Upon the aforesaid question of fact, the lower Appellate Court came to a finding favorable to the plaintiffs, and it is not disputed that there is evidence on the record to support it. I am, therefore, of opinion that this appeal must fail, and the question of law noticed above, and which has been argued before us, does not really arise. If it did arise, I should be inclined to hold that a right of a private ferry cannot be established as an indefeasible right by long user. Long uninterrupted user may be evidence of a lost grant or immemorial custom giving rise to the inference that the right had a legal origin. But the influence of the existence of the right from long user is one of *fact* and not of *law*; see *Bhuban Mohan Bannerjee v. J. S. Elliot* (1) and the *Mayor of Kingston-on-Hull v. Horner* (2). I may as well cite the observations of Lord Mansfield in the last mentioned case bearing upon this subject. There also a right similar to the one now in dispute was claimed without the production of a grant from the Crown. The plaintiffs in that case had to establish their exclusive rights to certain dues—a right which could only emanate from the sovereign power. He says: "Now, with regard to admitting evidence to satisfy a jury that a charter did exist within time of memory which is not produced by record, my opinion is this, namely, that all evidence is according to the subject-matter to which it is applied. There is a great difference between length of time which operates as a bar to a claim, and that which is only used by way of evidence. A jury is concluded by length of time that operates as a bar; as where the Statute of Limitation is pleaded in bar to a debt, though the jury is satisfied that the debt is due and unpaid, it is still a bar. So in the case of prescription, if it be time out of mind, a jury is bound to conclude the right from that prescription, if there could be a legal

(1) 6 B. L. R., 85.

(2) 1 Cowp., 102.

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commencement of the right. But any written evidence showing that there was a time when the prescription did not exist, is an answer to a claim founded on prescription. But length of time used merely by way of evidence may be left to the consideration of the jury to be credited or not, and to draw their inference one way or the other, according to circumstances."

Case remanded.

APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice Maclean.

IN THE MATTER OF THE PETITION OF JAMOONA.
 THE EMPRESS v. JAMOONA.*

1881
 Jan. 22.

Penal Code (Act XLV of 1860), s. 211—Making False Charge to Court or Officer having no Jurisdiction.

It is necessary for a conviction under s. 211 of the Penal Code that the false charge should have been made to a Court or officer having jurisdiction to investigate and send it up for trial.

THE accused, Jamoona, was charged under s. 211 of the Penal Code with having made a false charge of rape against one Sheikh Ahmed, with intent to injure him, before Captain Simpson, the Station Staff Officer of the Cantonment of Dorenda.

It was proved that she did make the charge, and it was also proved that the charge was false; and she was sentenced to one year's rigorous imprisonment.

The prisoner appealed to the High Court.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J.—This case came before one of the Judges of the present Bench in the vacation, and it occurred to him that no charge was made to any one competent to act upon it. Enqui-

* Criminal Appeal, No. 735 of 1880, against the order of H. L. Oliphant, Esq., Judicial Commissioner of Chota Nagpore, dated the 18th September 1880.

ries were, therefore, made as to the powers (magisterial or police) of the Station Staff Officer.

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From the papers within it will be seen that he has no such powers.

The appellant appeared before Captain Simpson, Adjutant, 11th M. N. I., and Station Staff Officer, and charged a non-commissioned officer with rape. There was an enquiry, and the charge being found to be false by the military authorities, the Commanding Officer caused the appellant to be prosecuted before the criminal authorities under s. 211. She was committed for trial, and convicted by the Judicial Commissioner under that section.

We are of opinion that the appellant neither instituted, nor caused to be instituted, a criminal proceeding. She, no doubt, charged the non-commissioned officer with an offence; but the Station Staff Officer having neither magisterial nor police powers, as we are informed, it seems to us that s. 211 will not apply. We do not think it is unduly refining the words of the section to say that the false charge must be made to a Court or to an officer who has powers to investigate and send up for trial.

We, therefore, set aside the conviction, and direct the appellant's discharge.

Conviction set aside.

CRIMINAL REFERENCE.

Before Mr. Justice Mitter and Mr. Justice Maclean,

THE EMPRESS *v.* NOBOCOOMAR PAL.*

1881
Jan. 28.

*Bengal Excise Act (Beng. Act VII of 1878), s. 53—Sale by Licensed Vendor
contrary to Terms of his License.*

Section 53 of the Bengal Excise Act does not apply to sales by a licensed vendor contrary to the terms of his license. That section provides for a breach of the condition of a license not covered by the second clause of s. 59 of the Act.

NOBOCOOMAR PAL was summarily tried before the Magistrate of Howrah, on a charge of having sold imported liquor

* Criminal Reference, Nos. 3 and 6 of 1881, from the order of J. P. Grant, Esq., Sessions Judge of Hooghly, dated the 6th January 1881.

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by the bottle, without a license empowering him to do so, and having, therefore, committed an offence under s. 53 of the Bengal Excise Act (Beng. Act VII of 1878). At the time of the alleged offence, the accused held a license (under Form 4A of those prescribed under the Act by the Board of Revenue) empowering him to sell only imported liquor, and that only by the glass, to be drunk only on the premises licensed, and not to be removed from them before consumption. The offence imputed to him was, that he sold imported liquor on several occasions by the bottle, delivering it to his customers at their own residences.

He was found guilty under s. 53 of the above Act, and sentenced by the Magistrate to pay a fine of Rs. 200, and to rigorous imprisonment in default of payment. An application was made to the Sessions Judge, who considered the conviction illegal, and referred the case to the High Court under s. 296 of the Criminal Procedure Code.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J.—The Magistrate of Howrah having convicted the petitioner, Nobocoomar Pal, of an offence under s. 53, Beng. Act VII of 1878 (The Bengal Excise Act), and sentenced him to a fine of Rs. 200, and rigorous imprisonment in default of payment, an application was made to the Judge of Hooghly, in order that the proceedings might be referred to this Court under s. 296, Criminal Procedure Code.

In his application Nobocoomar Pal raised two objections to his conviction and sentence: first, that he held a retail license for sale of spirits, and could not, therefore, be convicted under s. 53 of the Act; second, that he was not liable to rigorous imprisonment in default of payment of the fine.

The Judge has referred the case to this Court, and his opinion is, that s. 59, and not s. 53, of the Act applies. He brings to notice certain informalities in the proceedings of the Magistrate, and recommends that the proceedings may be set aside, or the fine reduced to Rs. 50.

We have carefully considered the papers sent up to us, and

have come to the conclusion, that s. 53 of the Act does not apply to this case. It is not disputed, that Nobocoomar Pal held a license for retail sale of imported spirituous and fermented liquors, which is one of the two classes of licenses to which the Act refers. The license, however (No. 49—4 A) restricts him to sale *by the glass*, and art. vi of the license confines the sale to his shop, and directs that the spirits, &c., shall be drunk on the premises. The Magistrate thinks, that because Nobocoomar had not a simple Retail Vend License (Form 4 B), and because he sold liquor by the bottle for consumption off the premises, he was justified in convicting him under s. 53.

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We concur with the Judge in his view, that s. 53 does not apply to sales by a licensed vendor contrary to the terms of his license. This seems to follow from a consideration of s. 60 with s. 53. If s. 53 were to be applied to wholesale sales by a retail licensed vendor, a fine of Rs. 500 might be imposed, whereas by s. 60, the maximum fine is Rs. 200 for that offence. Section 60 would be redundant if the construction put by the Magistrate upon s. 53 is correct, whereas it is, upon the construction we put upon it, quite consistent with the previous section and provides for a breach of the conditions of a license not covered by the second clause of s. 59.

As has been said already, Nobocoomar held a license for retail sale. An ordinary retail licensee might sell up to twelve quart bottles; but under its powers under s. 28, the Board of Revenue has regulated the conditions of Nobocoomar's license, and limited him to selling by the glass, with a condition that the liquor shall be drunk in his shop. The information laid against him was, that he had, on seven dates in April, May, and July 1880, sold liquor by the bottle without a bottle license. This seems to be another modification of the ordinary retail license.

The proceedings before the Magistrate were held under chap. xviii of the Criminal Procedure Code. It is therefore difficult to say, whether there was legal evidence for any conviction. In his summary and reasons the Magistrate alludes to account-books, orders, and bills, as satisfying him that the offence was committed. It would have been better if the

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Magistrate had summed up the evidence by which the orders and bills were *proved*, for their mere production is no evidence. Two of the orders refer to lemonade, and we are not aware that this is an excisable article.

We are unable to say for what offence the prisoner really was tried. The complainant was not examined as required by s. 144 of the Procedure Code, and it is certain, that the seven offences mentioned in the information could not be dealt with in one trial, *vide* s. 453, Procedure Code. The omission to record the date of the commission of the offence in the register as required by s. 229, Procedure Code, is, therefore, a material error, and the whole case shows the necessity of recording the few particulars required by law in trials under chap. xviii.

As we are unable, on the record as it stands, to say, that any offence has been made out for which the petitioner ought to have been convicted, we must set aside the conviction under s. 53, Beng. Act VII, 1878.

Conviction set aside.

APPELLATE CRIMINAL.

Before Mr. Justice Cunningham and Mr. Justice Prinsep.

1881
 Feby. 7.

IN THE MATTER OF THE PETITION OF SHUMSHER KHAN.
 THE EMPRESS v. SHUMSHER KHAN.*

Criminal Procedure Code (X of 1872), s. 36—Confirmation of Sentence by Sessions Judge.

Section 36 of the Criminal Procedure Code, as regards the necessity for confirmation of the sentence by the Sessions Judge, refers to cases in which the sentence of imprisonment is a sentence of upwards of three years, without including any additional sentence as to fine or whipping.

THE accused, who was a head constable, was charged with having received a bribe. The trial was held under the special powers conferred by s. 36 of the Criminal Procedure Code; and he was found guilty of an offence under s. 161 of the

* Criminal Appeal, No. 759 of 1880, against the order of A. C. Campbell, Esq., Deputy Commissioner of Goalpara, dated the 30th September 1880.

Penal Code, and was sentenced to rigorous imprisonment for three years, and to pay a fine of Rs. 1,000, or in default, to suffer rigorous imprisonment for a further period of six months.

The accused appealed to the High Court.

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Baboo *Rashbehary Ghose* and Baboo *Saroda Prosonno Roy* for the appellants.

The judgment of the Court (CUNNINGHAM and PRINSEP, JJ.) was delivered by

CUNNINGHAM, J.—We think that the appeal must be dismissed, on the ground that there is no sufficient reason shown for calling in question the deliberate conclusion at which the Magistrate has arrived.

With regard to the point that the sentence required the confirmation of the Sessions Judge, we think that the words of s. 36 of the Code of Criminal Procedure must be construed to refer to cases in which the sentence of imprisonment is a sentence of upwards of three years, and to leave aside any sentence the Magistrate may pass as to fine or whipping.

We, therefore, think that it is unnecessary for the sentence in this case to be confirmed by the Sessions Judge.

The appeal is dismissed.

Appeal dismissed.

Before Mr. Justice Miller and Mr. Justice Maclean.

IN THE MATTER OF THE PETITION OF JANOKINATH GUPTA.

THE EMPRESS v. JANOKINATH GUPTA.*

1881
Jan. 27.

Police Act (V of 1861), s. 29—Overstaying Leave without permission.

The failure of a Police constable to resume his duty on the expiration of his leave, does not constitute an offence under s. 29, Act V of 1861.

THE accused, a Police constable, obtained leave of absence from his duties, which had expired on the 15th October 1880. He obtained no extension of leave, but did not return to

* Motion, No. 9 of 1881, against the order of C. E. Buckland, Esq., Magistrate of Howrah, dated the 17th December 1880.

1881 resume his duties until the middle of December. He was
 IN THE MAT- then charged with having committed an offence under s. 29,
 TER OF THE Act V of 1861, by having overstayed his leave without per-
 PETITION OF mission, and being found guilty, was sentenced to two months'
 JANOKINATH rigorous imprisonment.
 GUPTA.

He petitioned the High Court against this conviction and sentence.

Baboo Baikant Nath Doss for the petitioner.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J.—The petitioner, a constable, obtained a month's leave, but failed to join his post at the expiration of that time. For this omission on his part he has been committed under s. 29, Act V of 1861, and sentenced to two months' rigorous imprisonment.

We think the conviction is bad, because his failure to resume his duty on the expiration of the leave, does not, in our opinion, constitute an offence under the aforesaid section.

The conviction is therefore set aside.

Conviction set aside.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

1881
 Feb. 7.

KEDARNAUTH DOSS AND ANOTHER (PLAINTIFFS) v. PROTAB
 CHUNDER DOSS AND OTHERS (DEFENDANTS).*

*Common Ancestor—Claim as Collateral Heir—Evidence—Amendment of
 Record on Appeal.*

Where the plaintiff claimed as paternal uncle's grandson and only heir of N, and the evidence showed that N's father was one of three brothers, but it was not stated in the plaint, nor shown by the evidence, who was the father of the three brothers,—*Held*, that the suit ought to be dismissed, it being incumbent on the plaintiff, claiming as a collateral heir, to show who the common ancestor was from whom he derived title.

A second plaintiff was added in the Court below, but no amendment was made in the record, and the suit was dismissed with costs. An appeal being brought, the original plaintiff failed to pay the costs, was made insolvent, and the Official Assignee declined to proceed with the appeal. It was objected that the appeal ought to be dismissed, there being no appellant on the record; but the Court allowed the appeal to proceed, and the amendment ordered by the Court below to be effected.

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APPEAL from a decision of BROUGHTON, J., dated the 20th August 1880.

The suit was brought for possession of a family dwelling-house and land in Calcutta. The plaint stated that one Nobocoomar Dhara was in his lifetime the absolute owner of the house and land in suit; that he died intestate and without issue in 1867, leaving his widow, Otulmoney Dossee, and the plaintiff, his paternal uncle's grandson, him surviving; that Otulmoney was in possession of the said house and land until her death, which took place in March 1879, when the defendants took possession of the premises and refused to give them up to the plaintiff, who submitted that, on the death of Otulmoney, he became absolutely entitled to the said house and land as the heir of Nobocoomar Dhara according to Hindu law.

Koylashmoney, the second plaintiff, was added during the hearing of the case.

The facts material to the report are sufficiently set out in the judgment of the Court.

The evidence having shown that Nobocoomar's father had two brothers, who were stated to be dead, but it was not shown how their property had devolved, Broughton, J., thinking the plaintiff's case very unsatisfactory, and remarking, among other things, that "none of the witnesses seem to know anything of the father of the three brothers," dismissed the suit with costs.

From this decision the plaintiffs appealed.

Mr. *Bonnerjee* and Mr. *Trevelyan* for the appellant Koylashmoney.

Mr. *Mitra* and Mr. *Lee* for the respondents.

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The following judgments were delivered :—

GARTH, C. J.—I think that the judgment of the Court below should be affirmed, upon the single ground that the plaintiff has not shown who is the common ancestor through whom he claims title to the property in question from Nobocoomar Dhara.

The case comes before us under rather peculiar circumstances. The original plaintiff, Kedarnauth Doss, claimed as the sole heir of Nobocoomar Dhara ; but it turned out at the trial that if the plaintiff should make out his title to the property, his mother, the witness Koylashmoney Dossee, would be entitled to a share of it. Upon this it was objected by the defendants' counsel that her name ought to be added as a co-plaintiff, and an order was made by the Court to that effect, although the plaint does not appear to have been amended.

The decree of the Court below being then given for the defendants with costs, the plaintiff Kedarnauth did not pay the costs ; consequently he has been made an insolvent by the defendants, and the Official Assignee has declined to proceed with the appeal on behalf of the creditors. Koylashmoney Dossee is, therefore, the only appellant, and an objection was taken before us that as it did not appear upon the proceedings that she was a party to the record, the appeal should be dismissed. But we thought it right under the circumstances to allow the argument to proceed, upon the understanding that an amendment was to be made by the proper officer in accordance with the order of the Court below.

We have, therefore, properly speaking, to consider only the case of Koylashmoney Dossee ; but as both plaintiffs claim under the same title, it will really be necessary to consider the whole case, as if Kedarnauth had not become an insolvent.

The plaintiff Kedarnauth claimed to be the heir of Nobocoomar Dhara, as being the only surviving son of his paternal uncle's daughter ; but it turned out in the course of the case that he had a brother, who is now dead, and who, if he had lived, would have been his co-heir. This brother's share, if he had any, would now have passed to his mother Koylashmoney, and this is the reason why she was ordered to be made a co-plaintiff.

Koylashmoney was herself called as a witness at the trial; and if her story is to be believed, she proved the following facts:—

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Rammohun, Ramjoy, and Rambuddo were three brothers; Koylashmoney herself was the only daughter of Ramjoy, and her father and mother were both dead. Rammohun left no children, and he and his wife are both dead; but Rammohun's mother, although an old woman, is not proved to be dead. Rambuddo, who would seem to have been known by other names, was the father of Nobocoomar, who died without issue, and his wife is dead also.

Several points were raised in the Court below and pressed upon us here by the defendants' counsel with regard to the insufficiency of the evidence; but I would decide the appeal upon this one point only.

The common ancestor is of course alleged by the plaint to have been the father of the three brothers; but it is not shown who or what he was, nor is even his name mentioned. No information whatever has been given to the Court respecting him, and no sufficient reason has been suggested why such a material element in the case has been omitted. It is certainly very remarkable that Koylashmoney, if her story be true, should not know who her father's father was; and it does not appear that any steps have been taken to ascertain that fact.

It must be borne in mind, that the brothers would not have inherited directly from one another, but through their father; and that the father would, if alive, be entitled to the property in question before Ramjoy. In this respect the rule of Hindu law is similar to the law of England since the Statute 3 and 4 Will. IV, c. 106, s. 5; and I believe that the rule of evidence there in cases like the present is correctly laid down in the last Edition of Roscoe's *Nisi Prius* Evidence, p. 1010, that where the plaintiff claims as a collateral heir, he is bound to allege and prove his title *through the common ancestor in all its stages*; and one most important stage is of course the common ancestor himself.

It is obviously only fair to the defendants that this rule should be strictly observed; because although Ramjoy, Ram-

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mohun, and Rambuddo may be said and believed by the witnesses to be three brothers, it is possible that they may in fact be cousins or related in some other degree, or that their legitimacy may be doubtful, or that they may have other brothers, who, if alive, would take as heirs in priority to the plaintiffs.

I think, therefore, that, upon this ground alone, the appeal should be dismissed with costs on scale 2.

PONTIFEX, J.—I agree with Broughton, J., that the evidence is untrustworthy and insufficient to entitle the plaintiff to a decree.

It seems to me incredible that Koylashmoney should not know her grandfather's name. But it may have been material to suppress it, as it might have given the defendants a clue. In my opinion the plaint ought to have stated the descent from a common ancestor, and the evidence ought to have supported such statement.

Then the failure of the male plaintiff to present himself as a witness is very gravely suspicious. According to the evidence of the Doctor, his father-in-law, Nobocoomar arranged his marriage and acknowledged him as his nephew. But if this is true, it must have happened immediately before Nobocoomar's death, and the necessary consequence must have been that the male plaintiff must have performed Nobocoomar's shrad.

Now the evidence does not show that he did perform the shrad, and according to the evidence the defendants must have been aware from being in the house whether he did so or not. If he had presented himself as a witness, the first question would have been—Did you perform the shrad or not; and if not, why not? It seems to me that he could not face this question; and not only do I think the evidence is insufficient to give the plaintiffs a decree, but I also have a very grave suspicion that the whole case is untrue. ♣

Appeal dismissed.

Attorney for the appellant Koylashmoney: Mr. E. O. Moses.

Attorney for the respondents: Baboo N. C. Bural.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

ABDOOL FUTTEH MOULVIE (DEFENDANT) *v.* ZABUNNESSA
KHATUN (PLAINTIFF).

1881
Feb. 7.

*Mahomedan Law—Husband and Wife—Maintenance—Decree for past
Maintenance.*

In a suit for maintenance by a Mahomedan wife against her husband, where there was no decree or agreement for maintenance before suit,—*Held*, reversing the decision of the Court below, that the decree should not have awarded past maintenance, but that maintenance should have been made payable only from the date of the decree.

Held also, that future maintenance should have been given only during the continuance of the marriage, and not during the term of the plaintiff's natural life.

APPEAL from a decision of WILSON, J., dated the 20th July 1880.

This suit was brought by the respondent Zabunnessa Khatun for dower and maintenance. She stated in her plaint that she was married to the defendant in Calcutta on the 12th March 1874; that on the same day, and in consideration of the marriage, a kabinamah or settlement was executed, by which defendant promised to pay her Rs. 10,000 on demand by way of dower; that she cohabited with him until the end of December 1877, when he left her, and had not since contributed anything to her maintenance. In November 1878, she demanded payment of her dower, and of the sum of Rs. 100 per month for her maintenance from January 1878, and that the defendant should make provision for her future maintenance at the same rate, as long as he should not cohabit with her.

The defence was, that the defendant's signature to the kabinamah had been obtained by the plaintiff's father fraudulently misrepresenting the status of the plaintiff among Mahomedans, which the defendant found afterwards to be much lower than his own; that the dower was not wholly payable on demand, but that a portion of it was deferred dower, and the kabinamah had been altered in that respect; that the plaintiff was not entitled to mainten-

1881 ance, as she had never lived with the defendant and the marriage
 ABDOOL FUT- had never been consummated. The defendant appeared in
 TEH MOULVIE person at the hearing.
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WILSON, J., gave the plaintiff a decree for the dower and for Rs. 1,400 for arrears of maintenance, from March 1878 until the end of June 1880, at the rate of Rs. 50 a month; and it was further ordered, that "the defendant should pay monthly to the plaintiff, during the term of her natural life, Rs. 50, from the 1st July 1880, for her maintenance and support."

From this decision the defendant appealed.

Mr. Piffard for the appellant.

Mr. Bonnerjee and Mr. Trevelyan for the respondent.

The judgment of the Court (GARTH, C. J., and PONTIFEX, J.) was delivered by

GARTH, C. J.—The only material question which we are called upon to decide in this appeal, is as to the maintenance. The plaintiff's right to the dower is hardly disputed.

Mr. Piffard certainly contended, in the first place, that the defendant was placed at a great disadvantage at the trial in consequence of being obliged to conduct his own case; and urged that the Court should allow him a new trial upon payment of costs. But there is clearly no ground for this contention. The defendant has never applied for a new trial in the Court below, and any disadvantage under which he has laboured is due to his own default.

With regard to the question of maintenance, Mr. Piffard does not object to the amount of the monthly allowance; but he contends that the decree is erroneous in two respects: first, that no order ought to have been made for past maintenance; and second, that it should have been made payable, not during the plaintiff's natural life, but only during the continuance of the marriage.

As the defendant conducted his own case at the trial, it would appear that the attention of the learned Judge was never called

to either of these points; but upon reference to the authorities, we think that Mr. Piffard's contention is well founded.

As to the first point, the law is stated thus in Baillie's Digest, p. 443:—"When a woman sues her husband for maintenance for a time antecedent to any order of the Judge or mutual agreement of the parties, the Judge is not to decree maintenance for the past." And the same rule is laid down in much the same terms in the Hedaya, Vol. I, p. 398, and quoted in the Tagore Law Lectures for 1873, p. 453. We think, therefore, that as in this case no decree or agreement for maintenance was made before this suit, the maintenance should have been made payable only from the date of the decree.

We think it also quite clear that maintenance can only be payable during the continuance of the marriage.

The decree will, therefore, be modified accordingly, and as the appellant has partially succeeded, we think that the parties should pay their own costs of this appeal.

Decree varied.

Attorneys for the appellant: Messrs. *Dhur* and *Dhur*.

Attorney for the respondent: Mr. *Leslie*.

INSOLVENCY JURISDICTION.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

IN THE MATTER OF MORGAN AND ANOTHER (INSOLVENTS).

E. S. GUBBOY v. A. B. MILLER.

1881

Jan. 18, 19,
§ 20 §
Feb. 7.

Insolvent Act (11 and 12 Vict., c. 21), s. 23—Reputed Ownership—Possession, Order, or Disposition—Consent of True Owner—Partner out of Jurisdiction—Mortgage of Chattels—Priority.

In 1878 the members of the firm of *A and Co.* mortgaged the live and dead stock, chattels, and effects belonging to the firm to *B*, the mortgage deed containing a clause to the effect that as long as there was anything due on the mortgage the mortgaged property should be treated and considered as the property, and in the order and disposition, of the mortgagee. *A and Co.* sub-

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sequently obtained further advances from *B*: at this time *A* was residing out of the jurisdiction of the Court, and the instruments creating the further charges were signed by his attorney. *C* and *D*, the two members of the firm residing in Calcutta, remained in possession of the mortgaged property up to the 10th May 1880, when they became insolvent, and their property was vested in the Official Assignee, who entered into possession. On the 12th May the mortgagee also entered into possession. On the 26th June *A*, the remaining partner of the firm, returned to Calcutta and filed his petition of insolvency.

Upon a petition by the mortgagee claiming to be paid his mortgage-money in priority to the other creditors of the firm,—

Held, that the goods and chattels of the firm which were covered by the mortgage and further charges did not vest in the Official Assignee upon the insolvency of *C* and *D*.

Reynolds v. Bowley (1) and *Ex parte Dorman* (2) followed: *In re Hill Ex parte Lepage* (3) distinguished.

APPEAL from a decision of BROUGHTON, J., dated 24th July 1880.

In this case it appeared that Richard Morgan, William Forbes, and Thomas Smith carried on business, as livery stable-keepers, in Calcutta, under the style of "Thomas Smith and Co." The business was carried on by Morgan and Forbes, Smith taking no part in the management, and residing in England. On the 5th May 1878 Morgan, Forbes, and Smith mortgaged all the live and dead stock, chattels and effects, good-will, debts, and sums of money outstanding, belonging to the business, to one Elias Gubboy, to secure the repayment of the sum of Rs. 35,000, with interest. The mortgage-deed contained a proviso, that as long as any money remained due on the mortgage, the mortgaged property should be treated and considered as the property and in the order and disposition of the mortgagee. On the 27th May 1878, and the 24th April 1879, further advances were made to the firm by Gubboy. These further charges were executed on behalf of Smith by his attorney. The mortgaged property remained in the possession of the mortgagors. On the 10th May 1880, Morgan and Forbes filed their petition in the Court for the Relief of Insolvent Debtors, and their estate and effects vested in the Official Assignee, who entered into possession. On

(1) L. R., 2 Q. B., 474; in the Court below, *Id.*, 41.

(2) L. R., 8 Ch., 51.

(3) *Post*, p. 636, note.

the 12th May, the mortgagee entered into possession. On the 26th June, Smith returned to Calcutta and filed his petition.

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The mortgagee now filed a petition, praying that the property comprised in the mortgage might be sold, and that his claim might be satisfied in priority to that of the other creditors. He contended, that the mortgaged property was not, by the consent of the true owners, in the possession, order, or disposition of the insolvents as reputed owners, within the meaning of s. 23 of the Insolvent Act.

Mr. *Phillips* and Mr. *Trevelyan* for the petitioner.

Mr. *Kennedy* for the Official Assignee.

Mr. *R. Allen* for an opposing creditor.

Mr. *Phillips*.—Section 23 of the Insolvent Act does not affect the mortgagee. This case comes within the principle laid down in *Reynolds v. Bowley* (1), which decides, that where one partner allows the other, *bond fide*, to carry on the business ostensibly as his own, on the bankruptcy of the latter, the share of the dormant partner in the partnership stock-in-trade cannot be dealt with as in the possession, order, or disposition of the bankrupt as reputed owner with the consent of the true owner. Here Smith was not insolvent at the time of the insolvency of the other partners. In *Ex parte Dorman* (2), the Lords Justices held, that the clause relating to goods in the possession, order, or disposition of a bankrupt is confined to cases where the bankrupt is in the sole possession of goods as the sole reputed owner; and they say,—“It is obvious that if the clause was held to apply to every case where goods, with the permission of the true owner, are left in the possession of a bankrupt, jointly with others as reputed owners, great injustice would be done in every case in which goods are left in the possession of a firm, one of whose members becomes bankrupt. It surely never could have been intended that if goods are left by the true owner in the possession of the firm of *A* and *B*, of whom *A* becomes bankrupt, but *B* remains solvent, the goods should

(1) L. R., 2 Q. B., 474; in the Court below, *Id.*, 41. (2) L. R., 8 Ch., 51.

1881 become the property of A divisible among his creditors." That
 IN THE case was approved of in *In re Bainbridge* (1), where it was
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Mr. Kennedy for the Official Assignee.—At the time when the petition was filed, so far as the 'mortgaged property was the property of Gubboy, the insolvents had, by the consent and permission of the true owner, in their possession, order or disposition, goods and chattels, of which they were the reputed owners, and of which they had taken upon themselves the sale, alteration, or disposition as owners. Such goods and chattels, therefore, became their property, so as to become vested in the Official Assignee. There was nothing to interfere with the management, sale, order, or disposition of the insolvents; and they did in fact deal with the property as owners. The insolvents, therefore, had in themselves the management of the property. The cases of *Reynolds v. Bowley* (3) and *Ex parte Dorman* (4) are distinguishable. This case comes within the principles laid down in *Ryall v. Rowles* (2). It has been said on the other side that *Ryall v. Rowles* (2) has been overruled. But in *In re Bainbridge* (1), which is cited as an authority for that proposition, it was merely said, that the law had been altered by statute, not that *Ryall v. Rowles* (2) had been overruled. The law laid down in *Ryall v. Rowles* (2) is untouched. In *In re Hill* (5), decided by Pontifex, J.,

(1) L. R., 8 Ch. Div., 218.

(2) 1 Ves., Sen., 375; S. C., 1 Atk., 164.

(3) L. R., 2 Q. B., 474; in the Court below, *Id.*, 41.

(4) L. R., 8 Ch., 51.

(5) *In re HILL*.

Ex parte LEPAGE,

In this case one Lepage sold his business, which was carried on under the name of "C. Lepage & Co.," to three persons, named Barham, Hill, and Seymour. The name of the firm was immediately changed to "Barham, Hill, & Co." Part of the purchase-money remained outstanding, and the

good will, stock-in-trade, shop-fixtures, and book-debts of the business were mortgaged to Lepage by his vendees, subject to a proviso for redemption on payment within seven years of the principal sum secured and interest. In 1870, Seymour, with the consent of Lepage, sold his share in the business to one Thomson, who agreed to become liable to Lepage for all claims which Lepage might have against Seymour. In 1871, the share of Barham (who was dead) was sold by his executor to Hill and Thomson, who agreed to become liable to Lepage in respect of such share. In 1871, Hill and Thomson

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August 14th, 1874, one Lepage, the original owner of a business, sold it to three persons, taking from them a mortgage of the stock-in-trade, etc., and leaving them in possession. Ultimately, the partners consisted of Hill, the insolvent, and one Hogan, who was a dormant partner and lived out of the jurisdiction. The whole of the property remained in the possession of the insolvent, with the consent of Hogan. *Ex parte Dorman* (1) and *Reynolds v. Bowley* (2) were cited, and it was argued that the principle of those cases prevented the property from being in the

executed a bond in favor of Lepage, for the purpose of securing the sum of Rs. 24,936 then due to him on the mortgage; and to secure certain other sums due by them to him, gave him their joint and several promissory note for Rs. 27,648. In December 1871, Thomson left India owing to ill-health, and shortly afterwards sold his share to one Hogan, remaining however liable to Lepage. Thomson was never advertised out of the firm in consequence of a private arrangement between himself and Hogan, who was admitted as a dormant partner. In 1873 Hill became insolvent, and filed his petition. Lepage filed a petition claiming priority.

Mr. Phillips for Lepage.

Mr. Kennedy and Mr. Evans for the Official Assignee.

Mr. Watson for Hill.

PONTIFEX, J. — Lepage claims to be not only a creditor of the estate, but a secured creditor. He claims under a deed which provided that he was not to be paid for seven years. The property was left in the possession of Hill. Mr. Phillips says, that the property was not in his possession with the con-

sent of the true owner. The proviso in the deed does not affect his possession — *Reynolds v. Bowley* (2); *Spackman v. Miller* (3).

The claimant has consented to Barham, Hill & Co. being in possession of the property mortgaged to him, and if it remained so, he could not take. Mr. Phillips has cited *Ex parte Dorman* (1) and *Reynolds v. Bowley* (2). In both these cases the possession of the property was the possession of both partners, and therefore was not such a sole possession, order, or disposition as required by s. 23 of the Insolvent Act. This case is different. Hogan was out of the jurisdiction, and was a dormant partner. Neither of the authorities cited would operate to enable the Official Assignee to succeed in any action against Hogan, and I do not see why Lepage is to be in a better position. The only person in whose possession, order, or disposition the goods were, was Hill.

Proof allowed subject to adjustment of the amount with the Official Assignee. In case of difference, to be referred to the Court. Preferential right disallowed, and the petitioning creditor to take rateably with the other creditors.

(1) L. R., 8 Ch., 51.

(2) L. R., 2 Q. B., 474; in the Court below, *Id.*, 41.

(3) 12 C. B., N. S. 669.

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order and disposition of Hill. But Pontifex, J., held, that the goods were in the order and disposition of Hill only, and that Lepage had no preferential right. *Reynolds v. Bowley* (1) is the case of a dormant partner, but what was there held was, that the dormant partner was actually in possession. He was not a mortgagee, the whole of the property belonged to him, that is to say, was in the order and disposition of the insolvent partner. Here the person who claims leaves the property in the disposition of persons who are insolvent. Gubboy was the true owner, and the property was in the order and disposition of the insolvents. Gubboy had the power to resume his rights, to take the property out of the possession of the persons to whom he had entrusted it, and therefore he was the true owner. In *Ex parte Dorman* (2), the property was in the possession of the solvent partner as well as in that of the insolvent partner. But the case is different here. The property was in the possession of the insolvent partners alone. Here the horses were kept for the purpose of being hired out, and the fact that the insolvents did let them out would strengthen the belief of the creditor that the insolvents were the actual owners. The interest of the partners in the partnership property was such as to be within their order and disposition, and they did deal with and dispose of it; *Hornsby v. Miller* (3). With respect to the rights of the mortgagee in substituted property, the mortgage-deed provides, that the mortgagors shall make over the live and dead stock, etc., to the mortgagee on demand in writing. That might include substituted and additional stock. But the right does not arise until demand in writing has been made, and there is no evidence of any such demand.

Mr. Allen for an opposing creditor. — This case is within the mischief which the Insolvent Act endeavours to prevent. Credit was acquired by the insolvents having possession of and dealing with the property. My clients dealt with the insolvents upon the faith that the property in the possession of the insolvents was their own property. It was in their visible posses-

(1) L. R., 2 Q. B., 474; in the Court below, *Id.*, 41.

(2) L. R., 8 Ch., 51.

(3) 1 E. & E., 192.

sion, and was actually dealt with by them as owners, at least, so far as regarded the public: *Ex parte The Union Bank of Manchester, In re Jackson* (1). Smith was neither in possession, nor exercising any rights of ownership. The mortgagee was the true owner. The three partners executed the mortgage, conferring the ownership on Gubboy. He allowed the property to remain in the possession of the insolvents; therefore, on the plain construction of s. 23, the property was in the possession of the insolvents with the consent and permission of the true owner. The case is clear, unless it is to be considered as affected by the English authorities. *Reynolds v. Bowley* (2) is distinguishable. The real reason of the decision in that case was, that, on the facts, the Court could not say that it came within s. 123 of 12 & 13 Vict., c. 106. The person in whose possession the property was, was both real and reputed owner. His sister was also real owner jointly in possession with him. She had transferred none of her rights. See the judgment of Phear, J., in *In re Agabeg* (3). *Ex parte Dorman* (4) is also distinguishable. There the property was in the reputed ownership of the infant. Here Smith is out of possession, and out of the jurisdiction. He is really insolvent. Had he been here, there would have been no difficulty. Does the fact of his absence improve the mortgagee's position? He has parted with his right as owner.

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Mr. Phillips in reply.

BROUGHTON, J. (after stating the facts of the case, continued).—The Official Assignee contends, that the property was in the possession, order, and disposition of the insolvents within the meaning of the 23rd section of the Insolvent Act, and must be deemed to be the property of the insolvents, Morgan and Forbes.

If the Official Assignee is wrong in this contention, it follows that the substantial partner of a business in Calcutta may

(1) L. R., 12 Eq., 354.

(3) 2 Ind. Jur., N. S., 340.

(2) L. R., 2 Q. B., 474; in the Court

(4) L. R., 8 Ch., 51.

below, *Id.*, 41.

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leave the country, mortgage the whole of his share in the business for its full value, and leave his partners, who may be men without any or with very little capital, to carry on the business on the same scale as before, while the mortgagee, who is the real owner, may lie by; and if he only steps in after the partners here have filed their petitions, but before the partner who is absent has time to come out and do the same, may sweep away the whole of the assets of the partnership, and leave the other creditors, who may have dealt with the firm on the credit of its apparent wealth, with nothing. It seems to me that this is a state of things directly in conflict with the spirit of the 23rd section of the Insolvent Act, which is intended to prevent traders trading on fictitious credit. Nevertheless, if the law is so, it must be obeyed; and Mr. Phillips, on behalf of the mortgagee, contends, upon the authority of certain cases decided in the English Courts upon similar sections of the Bankruptcy Acts, that so it is.

The words of s. 23, upon which the question turns, are these :—

“ If any such insolvent shall, at the time of filing the petition, by the consent of the true owner thereof, have in his possession, order, or disposition any goods or chattels, whereof such insolvent is reputed owner, or whereof he has taken upon him the sale, alteration, or disposition as owner, the same shall be deemed to be the property of such insolvent so as to become vested in the Official Assignee of the Court by the order made in pursuance of the Act.”

The first case upon which Mr. Phillips relies, in order of date, is the case of *Reynolds v. Bowley* (1).

In that case the plaintiff was the sister of Mr. T. H. Reynolds, a cowkeeper, who was adjudged bankrupt on the 9th December 1864. The defendants were the creditor's assignees.

The plaintiff and her brother owned a number of cows and the stock of a dairy farm, in equal shares; and they entered into a written agreement to carry out the business with an equal share in the profits. They agreed to take the farm on a 14-years' lease, and in the case of the death of Mr. T. H. Reynolds,

(1) L. R., 2 Q. B., 474; in the Court below, *Id.*, 41.

the plaintiff was to retain her interest or share in the lease. The plaintiff also agreed to be a sleeping partner, the business to be conducted and carried in the name of T. H. Reynolds. The lease was granted to T. H. Reynolds alone. They both resided at the farm-house. The plaintiff did not interfere in any way with the management of the business, but devoted her whole time and labor to assisting her brother. It was not generally known that the plaintiff was a partner, although it was known to their relatives and friends, and to some of the tradesmen in the neighbouring town, Swindon. The plaintiff and her brother drew equally on account of their shares in the profits.

On November 16th the brother being embarrassed on account of a bill accepted by him for a brother, absconded, and then committed an act of bankruptcy, of which the plaintiff had notice; but she remained on the farm selling the milk, &c., until the property was seized by the messenger of the Court.

On the 9th of December, T. H. Reynolds was adjudicated a bankrupt, and the defendants were appointed creditors-assignees, and the messenger seized the stock on the same day under the usual warrant. On the 10th of December, notice was given to the defendants that the plaintiff claimed an interest in the stock. In January 1865 the defendants, under an order of the Court, sold the stock. Under these circumstances, the Court of Queen's Bench held, on the authority of the decided cases, but with some doubt, that the stock was in the possession and order and disposition of the bankrupt with the consent of the true owner, and might be dealt with under s. 125 of 12 and 13 Vict., c. 106, a section similar in its terms to the 23rd section of the Indian Insolvent Act. But this decision was reversed by the Court of Exchequer Chamber. The Chief Baron adopted the words of Baron Parke in *Load v. Green* (1), viz., that the true owner must be one person, and the apparent owner another person, in order that the property might pass to the creditors-assignees; and that, as the brother, who was bankrupt, and the sister were equally entitled to possession and equally owners, the section did not apply. Mr. Justice Willes and Baron Bramwell came to the same conclusion as the Chief Baron, but put it on the ground that the bankrupt was not in

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fact in sole possession of the property; his sister was as much in possession as he was.

The case of *Reynolds v. Bowley* (1) differs from the present case in this particular, namely, that the property was in the possession of the bankrupt. In the present case, the third partner, Thomas Smith, acting by his attorney, had mortgaged the property to the present claimant, who was the true owner—*Ex parte Union Bank of Manchester, in re Jackson* (2).

But then it is said that the property was not in the order and disposition of Morgan and Forbes, but of the three partners—Smith, Morgan, and Forbes; and at the date of the insolvency of the two latter, Smith was not insolvent, so that the mortgagee had a right to come in and claim the property on the 12th of May, and the case of *Ex parte Dorman* (3) is relied on.

In that case *Dorman*, the landlord, let his house to a partnership, consisting of two partners—Lake and Clench. Clench was a minor. There were certain trade fixtures, and there was some machinery in the house used in the business of the partnership, the two partners being in possession.

On the 29th September 1871, both Lake and Clench committed an act of bankruptcy. On the 23rd November Lake was adjudicated bankrupt, but no petition in bankruptcy was presented against Clench on account of his infancy. *Dorman* claimed the machinery, plant, and type comprised in the lease; but it was ordered by the Registrar in Bankruptcy, sitting as Chief Judge, to be made over to the Trustee in Bankruptcy. From this order *Dorman* appealed. The words of the section of the Act upon which this decision rested (32 and 33 Vict., c. 11, s. 15, cl. 5) are similar to those of s. 23 of the Indian Insolvent Act, and the Lords Justices held, that the clause was confined to cases where the bankrupt is in the sole possession of goods as the sole reputed owner. "The judgment was delivered by Sir George Mellish, who gave his reasons for the decision very fully. He said:—"It is obvious that if the claim was held to apply to every case where goods, with the permission of the true owner,

(1) L. R., 2 Q. B., 474; in the Court below, *Id.*, 41.

(2) L. R., 12 Eq., 354.

(3) L. R., 8 Ch., 51.

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are left in the possession of a bankrupt, great injustice would be done in every case in which goods are left in the possession of a firm, one of whose members becomes bankrupt. It surely never could have been intended that if goods are left by the true owner in possession of the firm of *A* and *B*, of whom *A* becomes bankrupt, but *B* remains solvent, that the goods should become the property of *A*, divisible among his creditors. Cases have happened in which one member of a most wealthy and solvent firm has, from his private extravagance, become bankrupt, and surely it would be absurd that all persons who had trusted the firm with the possession of their goods should be deprived of their property. Then does it make any difference that in this particular case the person who was in possession of goods with the bankrupts as reputed owners was an infant? We think it makes no difference. The fact of Clench being an infant did not prevent him from being in possession of the goods jointly with Lake, nor from being one of the reputed owners of the goods. The lease to him was not void, but only voidable, and Lake having knowingly entered into a contract of partnership with an infant, could not deprive him of his rights as a partner. It was argued, indeed, that the case came within the mischief against which the order and disposition clause was intended to provide, and we think it must be admitted that it does; but still a consistent construction must be put upon the clause, and we think it must be construed either as confined to cases in which the bankrupt is solely in possession, or as extending to all cases in which the bankrupt is in possession jointly with others. There are no words in the clause which enable us to distinguish between cases which we might think within the mischief intended to be prevented, and cases to which the clause was plainly not intended to apply. We cannot, for instance, make a distinction between cases in which the partner of the bankrupt is solvent, and cases where he is insolvent, though for some cause he is not made bankrupt; or between cases in which the partner of the bankrupt is an infant and cases in which he is of full age."

This decision was followed by the Chief Judge in Bankruptcy, Vice-Chancellor Bacon, who said:—"The Act of Parliament is perfectly clear, and even if I had not the assistance of *Ex parte*

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Dorman (1), and if I was not bound by that case, I should act upon it. It is as clear as anything can possibly be."—*In re Bainbridge* (2).

The Lord Chief Justice of England, in deciding the case of *Reynolds v. Bowley* (3), in the first instance pointed out that there might be cases of hardship on either side; and from the judgment in *Ex parte Dorman* (1) it must be taken as decided in England, that the section must receive a consistent construction, independent of the circumstances of the particular case; and as the Indian enactment is an Act of Parliament identical in its terms, and having the same object, these decisions are, I conceive, binding upon me; and the reasons upon which they proceed must also be admitted, as Mr. Phillips contends, to be unanswerable.

There is, however, a marked difference between the present case and the two cases of *Reynolds v. Bowley* (3) and *Ex parte Dorman* (1). In both these cases the partners were actually in possession and on the premises. Here one partner was absent from the country, and the only persons who were in actual manual possession of the property were the two insolvents. This, it seems to me, must be the possession contemplated by the Statute, the object of which is to prevent a trader acquiring a false credit by having in his visible possession another person's property.

In the present case there is a clause in Mr. Gubboy's mortgage to the effect, that as long as there is any money due to him upon it, the stock-in-trade upon the premises in the occupation of the insolvents shall be treated and considered as the property and in the order of Mr. Gubboy, the mortgagee. Mr. Phillips has drawn my attention to this clause, but he does not to any extent rely upon it; he rather puts his argument on the decisions of the English Courts in the cases I have quoted. I should hold that the clause itself cannot override the Act of Parliament, and that the parties cannot make a contract, the effect of which would be, if it were upheld, to deprive the public of the benefit of a law enacted for their protection.

Mr. Gubboy did, however, himself rely upon this proviso and abstained from taking actual possession of the premises until

(1) L. R., 8 Ch., 51.

(2) L. R., 8 Ch. Div., 218.

(3) L. R., 2 Q. B., 474; in the Court

below, *Id.*, 41.

after the 10th May, when Messrs. Morgan and Forbes filed their petition, and when the vesting order on that petition was made.

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It is said that the fact that the firm was carried on in the name of T. H. Smith, and not in that of the other partners, supports the contention of Mr. Gubboy. That argument is, I think, answered by observing, that it is a matter of notoriety that partnerships are often carried on in the names of persons who have long ceased to have any connexion with the business. The question seems to me to be—"To whom was credit given?" and the answer is—"To the ostensible partners, Messrs. Morgan and Forbes." And the further question is—"Why was that credit given to them?" the answer is—"Because they appeared to be the owners of a large stock of horses and carriages of their own, dealing with them as their own on the premises in which they were in visible occupation." It cannot be supposed that Mr. Allen's client, a native dealer in hay and straw, would have allowed Messrs. Morgan and Forbes to run up a bill to the amount of Rs. 10,000 if he had known that the real owner of the property was Mr. Gubboy, with whom he made no contract, or that Mr. T. Smith, who resided in England, was in possession of the property. On this ground, I am of opinion that this case can be clearly distinguished from the cases relied on for the mortgagee. I do not come to this conclusion in the absence of authority. I refer to the observation of Mr. Justice Willes in the case of *Reynolds v. Bowley* (1), who says:—"I am clearly of opinion in accordance with the conclusion of the Lord Chief Baron, that the fact of a business being carried on in the name of an ostensible partner does not necessarily make a reputed ownership in the partner whose name is used. Such a partner may or may not be—I think in this case he was not—a reputed owner."

I have said that, in my view, the use of the name "Thomas Smith" is not material. Messrs. Morgan and Forbes might call themselves Thomas Smith and Co. if they wished to do so, and did not infringe the rights of others in so doing; and I think this is one of those cases to which Mr. Justice Willes refers, and

(1) L. R., 2 Q. B., 474; see p. 481.

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that I have his authority for holding that Messrs. Morgan and Forbes were the reputed owners, and that the property was in their order and disposition.

There was also a case (1) decided in August 1874 by Mr. Justice Pontifex, in which the circumstances were somewhat similar, and in which both the English cases quoted by Mr. Phillips were discussed. The case was that of the insolvency of Mr. Hill, of the firm of Barham and Hill, the booksellers. Mr. Lepage, who originally owned the business, had sold it to Messrs. Hill and Seymour and to the executors of Mr. Barham, taking a mortgage to secure his purchase-money, and leaving the new firm in possession. There were subsequently some changes among the partners; and at the time of Hill's insolvency, the firm consisted of Messrs. Hill and Hogan. The latter was a Government servant, and on that account stipulated that he would not take any active part in the management, but was to be a sleeping partner; and he left the whole of the property in the possession of his partner, Hill, who was then in sole actual possession with the consent of his partner Hogan, and of Lepage the mortgagee. It was held, that the property vested in the Official Assignee. So here, I think, that the property was in the order and disposition of the insolvents, Morgan and Forbes, and upon their insolvency vested in the Official Assignee; and that the petition of Mr. Gubboy to be paid in full must be refused.

The Official Assignee informs me that this question has been argued by arrangement on this petition to avoid the expense of a suit, and agrees that the costs of all parties be paid out of the estate.

From this decision Mr. Gubboy appealed.

The *Advocate-General* (Mr. G. C. Paul) and Mr. Phillips for the appellant.

Mr. Kennedy and Mr. R. Allen for the Official Assignee.

Mr. Phillips.—It is contended that though Smith was entitled to one-half of the property, it must be considered that Gubboy

(1) *Ante*, p. 636, note.

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left the whole of the property in the order and disposition of Morgan and Forbes to the exclusion of Smith. It is not shown that he knew that Smith was absent. It is more probable that Gubboy would prefer to trust Smith than the junior partners. *Reynolds v. Bowley* (1) shows that the partner out of the country cannot sweep away the assets of the concern as the learned Judge in the Court below thought he could. It is not shown that Gubboy assented to Morgan and Forbes having exclusive disposition; it can only be inferred from the fact that they were the only partners here. I only admit that Smith was out of the country when the further charges were made. In *Reynolds v. Bowley* (1) the Court considered the case to be that of a secret partner. It is not pretended that Smith was a dormant partner; he was merely out of the country. [PONTIFEX, J.—In all the English cases the partner was in the country and in possession. Might not the decisions have been different if the partner had been abroad?] There is nothing in *Reynolds v. Bowley* (1) which shows that the case turned in any way on the partner being on the spot. Smith, by going to England, did not leave his goods in the sole disposition of the other partners; they held for him and themselves. Suppose that they all went away, would they all be out of possession? If the property had been left in charge of a manager, would it have gone to his assignees? If a man goes away from his house, leaving his servants in charge, he remains in possession of the goods in the house.

In *Ex parte Dorman* (2) the possession was possession as partners; there was nothing about “actual” possession. Here Smith was carrying on trade; further charges for the purposes of the trade were made by his attorney. Possession in the popular sense is not the possession meant by the Statute. Otherwise possession by a servant would pass the master’s goods to the assignee on the servant’s insolvency. Suppose, after the insolvency of Morgan and Forbes, Gubboy had allowed the goods to remain in Smith’s possession, then they would have been in his order and disposition, and would have passed to his assignee. In *In re Bainbridge* (3), Bacon, C. J., says:—“Can it be said

(1) L. R., 2 Q. B., 474; in the Court below, *Id.*, 41. (2) L. R., 8 Ch., 51.

(3) L. R., 8 Ch. D., 218.

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that, these two gentlemen carrying on partnership together, any one part of this property remained in the order and disposition of the bankrupt with the consent of the true owner? Not only do I adopt the judicial interpretation in *Ex parte Dorman* (1) and say, that s. 15, sub-section 5, relates to sole possession of that kind alone, but I say that it must be necessarily so; for it is impossible to point out anything in the case to show that either of these partners was more a partner than the other. Partners are possessed *per mie et per tout*; and each of them was lawfully in possession of the whole of the assets, but not exclusively in possession, not solely in possession." [GARTH, C. J.—Might not the shares of the partners only pass?] The reason that anything of Gubboy's would pass would be because he had left it in the possession, order or disposition, and reputed ownership of the insolvents. It cannot be said that he left it in their possession according to their shares, so that if one became insolvent his share would pass. There are no words in the Act which refer to shares. *In re Bainbridge* (2) was the case of a share, and it was held that it did not pass. This case turns on Gubboy's having the legal right in the goods and chattels. If the decision is correct, they would pass to the Official Assignee on the insolvency of any person in whose possession they happened to be to the exclusion of both mortgagor and mortgagee. Credit was not obtained by the possession of the mortgaged goods. In *Belcher v. Bellamy* (3), Parke, B., says:—"It is evident that, at the present day, a trader does not obtain credit by the possession and apparent ownership of other persons' goods, but in consequence of his general estimation as a merchant. In order to bring a case within the provisions of the Bankrupt Act, there must be a real owner distinct from the apparent owner, and the real owner must have consented that the trader should have possession of the goods." Here Thomas Smith & Co. was the name of the firm; it is useless to talk of persons advancing money on the faith of Smith not being a member of the firm: *Ex parte Vaux* (4).

(1) L. R., 8 Ch., 51.

(2) L. R., 8 Ch. D., 218.

(3) 2 Exch., 309.

(4) L. R., 9 Ch. App., 602.

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Mr. Kennedy for the Official Assignee.—The case of *In re Bainbridge* (1) was based on a Statute which is not in force here. *Ryall v. Roules* (2) is still an authority; it has only been impeached to this extent, that, as far as goods and chattels are concerned, the law has been altered by Statute. In *In re Bainbridge* (1) all that passed by virtue of the assignment was purely a *chose in action*. *Choses in action* are excluded by the late Bankruptcy Act in England from the operation of the order and disposition clause; they were included under goods and chattels in the old Acts. Taking the whole of this mortgage-deed together, it appears to be framed for the purpose of infringing the insolvent law and sweeping away the property of these persons from their creditors. Such a clause is in direct contravention of s. 23 of the Insolvent Act. Gubboy knew that in case of insolvency he might be treated as having allowed his property to be in the order and disposition of the insolvents, and therefore liable to be applied in paying the other creditors of the firm, and he tried to avoid that. Assuming that the firm was insolvent, the effect of a partner remaining abroad does of itself make him the subject of the insolvent law. The law infers from the natural consequences of a man's act that his intention was, the consequences should follow—Griffith and Holmes' Bankruptcy, 98. Mere constructive possession in a person who really has nothing to do with the property, is not actual possession of property. In all the cases there was actual manual possession. In *Reynolds v. Bowley* (3), Kelly, C.B., says:—"It is not to be denied that there may be cases of a partnership in which goods shall be in the possession, and in the apparently exclusive ownership, of the ostensible partner, so as to enable him to obtain credit by reason of his possession and apparently exclusive ownership by which a body of creditors may be wronged and even defrauded; and in which such a possession may be entrusted to him by another member of the partnership under circumstances in which the property ought to pass to the assignees of the bankrupt." That was the view taken in *In re*

(1) L. R., 8 Ch. D., 218.

(2) 1 Ves. Sen., 375; S. C., 1 Atk., 164.

(3) L. R., 2 Q. B., 474; in the Court below, *Id.*, 41.

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Hill (1). That case decides that where a partner is not really in possession, the possession, order, and disposition are with the partner in charge. These goods were in the sole possession and in the sole reputed ownership of Morgan and Forbes—*Ex parte Dorman* (2). Section 23 only applies to a class of goods the possession of which implies property, not to the case of factors and commission agents. The mortgagee is the true owner; all the cases go upon that. The word "possession" should have such a meaning as to exclude a person not in actual possession. The words of the Act are possession, order or disposition, not order and disposition. The insolvents took upon themselves the "sale, alteration or disposition" of the mortgaged property. That is a question of fact—*Horn v. Baker* (3) and *Ex parte Emerson* (4).

Mr. *Allen* on the same side.—Gubboy endeavoured to contract himself out of his liability under s. 23. The object of that section is to render available for creditors that property which has been held out to the public as a basis for credit. The question is one between the creditors and the true owner. The creditors would not have trusted Morgan and Forbes if they had known the property was Gubboy's. Morgan and Forbes were exercising rights of ownership. This is precisely the case which the section was meant to provide against, a case where one person is enabled to obtain a false credit by the possession of goods which really belong to some one else. The section refers to actual possession, to the case of a creditor seeing his debtor apparently exercising rights of ownership over property which really belongs to a third party. Such actual possession is distinguishable from constructive possession. Actual possession once fully acquired can only be lost by deliberate intention on the part of the owner to give up possession.—*Domat*, Bk. III, Tit. 7, s. 1. Smith was not in possession of any of the goods. Morgan and Forbes were in possession. There cannot be a passive acquisition of property. There is a distinction between acquiring a right to possess and acquiring

(1) *Anle*, p. 636, note.

(2) L. R., 8 Ch., 51.

(3) 9 East, 215.

(4) 41 L. J., Bkey., 20.

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possession.—Domat, Bk. III, Tit. 7, s. 2. The thing possessed must be certain; there must be a present intention in the mind of the possessor to possess a certain and definite thing. The possession of Smith was not actual, it could only have been constructive. He could only have the right to possess things bought during his absence. He was not an active partner. His only acts were the mortgage and further charges. He must be treated as a sleeping partner; there is no evidence of his active interference with the affairs of the firm which was carried on by Morgan and Forbes. The mere use of the words "Thomas Smith & Co.," is not sufficient to show that he was an active partner. In *Reynolds v. Bowley* (1) the facts did not show that the real owner was separate from the apparent owner. — In *re Agabeg* (2). In *Reynolds v. Bowley* (1) there was actual possession by the brother and sister; both were actively working in the business. Here there was no active interference on the part of Smith. His possession could only be said to be constructive. There was consent to the reputed ownership of Morgan and Forbes—*Load v. Green* (3).

In *Ex parte Dorman* (4) there was actual possession. The goods possessed were owned by the landlord: the lessees had only the right of user. They could have made no title nor have passed any property in the goods. To make that case an authority, it must be extended to a case of constructive possession.

Mr. *Phillips* was not called upon to reply.

Cur. ad. vult.

The following judgments were delivered :—

PONTIFEX, J. (after stating the facts of the case, continued).—The sole question we have to decide is, whether the absence of Smith in England had the effect of placing the goods and chattels of the firm in the possession, order or disposition of his two partners within the meaning of s. 23 of the Insolvent Act.

If it had that effect, it will be impossible for any partner in a Calcutta firm, even when the firm as a firm is solvent, to go to England without incurring considerable risk.

(1) L. R., 2 Q. B., 474; in the Court below, *Id.*, 41. (3) 15 M & W., 216.

(2) 2 Ind. Jur., N. S., 340:

(4) L. R., 8 Ch., 51.

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If it had not that effect, s. 23 becomes almost inoperative whenever a partner in an insolvent firm is in England.

It is, of course, a matter of constant occurrence that some one partner of a Calcutta firm should be in Europe for health or relaxation.

The construction of the section in the English Bankruptcy Act, corresponding with s. 23 of the Indian Insolvency Act, has lately received considerable attention with reference to partners; and the outcome of the decisions is certainly in accordance with common sense; for the section is a limitation of, or derogation from, the rights of the true owner, and accordingly to be construed with strictness. It may be stated thus,—If the possession by one partner of the goods of the firm is justifiable—if the circumstances are such as to show that his possession is for purposes strictly connected with the partnership, then the order and disposition section will not apply. For the goods are not in his sole possession, order or disposition. His actual possession is on behalf of himself and his joint owner.

There may perhaps be cases, such as *Lepage's case* (1), decided by myself, and very briefly reported at p. 33 of Vol. VI, Calcutta Reports, where the circumstances may make a material difference. In that case there seems to have been a private arrangement, that the fact of Hogan being a partner should be concealed, he being a Government officer; and the name of Thomson, his predecessor in the firm, was continued with that object, although his interest in the firm had ceased. Hogan was not simply a dormant partner, but from his position as a Government officer, it was necessary for him to conceal the fact of a partnership.

But whether that case was rightly decided or not, it is in my opinion distinguishable from the present case. How can it be said in the present case that the action of Smith in allowing these goods and chattels to remain in the actual possession of his two partners was unjustifiable? He had, according to a very common practice, gone to Europe; there is no evidence to show that he did not intend to return: indeed, during his absence he gave evidence of two emphatic acts of ownership by executing

(1) See *ante*, p. 636, note.

the further charges through his attorney. There is no pretence for saying even that he was a dormant partner, and certainly he did not court concealment, for he allowed the business to be carried on in his own name.

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The case of *Reynolds v. Bowley* (1) decided that the order and disposition section did not apply to the case of a partner who had agreed to be a dormant partner, but who in fact resided on the premises and devoted his whole time and labor in assisting the acting partner in the management of the business. The majority of the Judges based their judgment on the broad ground that the order and disposition section does not apply to cases where the person in possession is himself a joint owner; and, having as much right to possession as his co-owner, holds possession by virtue of his own ownership. I find that Mr. Justice Lindley, in considering this case, says in his valuable book, p. 1162 (4th Edn.):—"If this view should prevail, and on principle it appears correct, the clause in question will never be applicable to dormant partners. But until this reasoning has been adopted in bankruptcy, some uncertainty on this important point must exist." But there have been two later decisions confirming the principle of *Reynolds v. Bowley*,—namely, *Ex parte Dorman* (2) and *In re Bainbridge* (3). In *Ex parte Dorman* (2), Lord Justice Mellish said: "There are no words in the clause which enable us to distinguish between cases which we might think within the mischief intended to be prevented and cases to which the clause was plainly not intended to apply. We cannot, for instance, make a distinction between cases in which the partner of a bankrupt is solvent and cases where he is insolvent, though for some reason he is not made bankrupt."

The main difficulty which affected me in considering the case arose from the fact that Smith's absence in England put it out of the power of his trade creditors to make him an insolvent here. But a similar difficulty occurred in *Ex parte Dorman* (2), where one of the partners was an infant, and therefore not within the Bankrupt Act.

I am of opinion that the goods and chattels of the firm, which

(1) L. R., 2 Q. B., 474.

(2) L. R., 8 Ch. App., 51.

(3) L. R., 8 Ch. D., 218.

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were covered by the mortgage and further charges, did not vest in the Official Assignee upon the insolvency of Morgan and Forbes.

A question was raised by Mr. Allen, whether, in consequence of the assignee being in *de facto* possession at the date of Smith's insolvency, Mr. Gubboy can now claim possession. But, in the first place, it is evident, that such *de facto* possession was the result of arrangement, and to be treated without prejudice to the rights of the parties on the 12th May; and in the next place, it cannot be said that, after the 12th May, the assignee was in possession with the consent of the true owner so as to allow the section to operate.

I am, therefore, of opinion that Mr. Gubboy is entitled to the benefit of his mortgage and further charges. But the effect of those deeds must be enquired into and adjudicated on by the lower Court; and for this purpose the case must be remitted there. Mr. Gubboy must have his costs in both Courts. The assignee will be entitled to his costs out of the estate.

GARTH, C. J.—I am quite of the same opinion.

The rule laid down in the case of *Ex parte Dorman* (1) appears to me to be founded upon the most manifest justice.

It must be quite understood that all questions as to what property of the firm Mr. Gubboy was entitled to under his mortgage-deeds, are left open by our judgment. All we decide is, that he has not been deprived of that property, whatever it was, by force of the provisions of s. 23.

Appeal allowed.

Attorney for the appellant: Mr. Gregory.

Attorneys for the Official Assignee: Messrs. Barrow and Orr.

(1) L. R., 8 Ch. App., 51.

CRIMINAL REFERENCE.

*Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Mitter,
and Mr. Justice Maclean.*

THE EMPRESS v. M. J. VYAPOORY MOODELIAR.*

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Jan. 22, and
Feb. 9.

Evidence, Admissibility of—Receiving Illegal Gratification—Penal Code (Act XLV of 1860), ss. 161, 165—Evidence of Subsequent, but Unconnected Receipt, showing footing on which Parties stood—Evidence Act (I of 1872), ss. 5—13 & 14.

The accused was charged with having received illegal gratification from *C. and Co.*, on three specific occasions in 1876. In 1876, 1877, and 1878, *C. and Co.* were doing business as commissariat contractors, and the accused was the manager of the Commissariat office. *Held*, that evidence of similar but unconnected instances of receiving illegal gratifications from *C. and Co.*, in 1877 and 1878, was not admissible against him under ss. 5 to 13 of the Evidence Act.

Held, per GARTH, C. J. (MACLEAN, J. concurring), the evidence was not admissible under s. 14.

Per GARTH, C. J.—Section 14 applies to cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it; not to cases where the question of guilt or innocence depends upon actual facts, and not upon the state of a man's mind or feeling.

Per MITTER, J.—If the receipt of the illegal gratifications mentioned in the charge be considered proved by other evidence, and if it were necessary to ascertain whether the accused received them as a motive for showing favor in the exercise of his official functions, the alleged transactions of 1877 and 1878 would be relevant under s. 14, but they would not be relevant to establish the fact of payments in 1876.

THIS was a reference to the High Court, on a difference of opinion between two Judges sitting as the Special Court of British Burma.

The case referred was as follows :

"The accused was charged under s. 161 of the Penal Code with receiving illegal gratifications, on three distinct occasions,

* Criminal Reference, No. 1 of 1880, and Letter No. 8-1, from R. J. Crosthwaite, Esq., and C. F. Egerton Allen, Esq., Judges of the Special Court of British Burma, dated 12th November 1880.

1881 at Tonghoo, in the year 1876, from the firm of Cohen and
 EMPRESS Co.; and there were also three counts charging him under
 v. s. 165 of the Penal Code with reference to the same sums.
 M. J. VYA- He was tried before the Additional Recorder and a jury, and
 POORY acquitted by a majority of the jury on all the charges; and the
 MOODELIAR Additional Recorder, dissenting from the opinion of the majority,
 referred the case to the Special Court under s. 263 of the Criminal Procedure Code.

“ At the trial evidence was admitted of similar, but unconnected, receipts of illegal gratifications by the accused from the same firm of Cohen and Co. during the years 1877 and 1878 at Thayetmyo. At both places, and in the three years, 1876, 1877, and 1878, the firm of Cohen and Co. were doing business as commissariat contractors, and the accused was the manager of the Commissariat office, first at Tonghoo, then at Thayetmyo.

“ The Officiating Judicial Commissioner, at the hearing before the Special Court, was of opinion, that the evidence as to the similar but unconnected receipts of illegal gratifications at Thayetmyo, during the years 1877 and 1878, was not admissible to prove the specific charges relating to the year 1876, and therefore thought, that the verdict of the majority of the jury acquitting the accused should not be interfered with. The Additional Recorder was of opinion, that that evidence was admissible, and that the verdict of the majority of the jury should be reversed.

“ The Officiating Judges, therefore, being unable to agree in a judgment, referred the case under s. 80 of the Burma Courts Act (XVII of 1875) to the High Court of Judicature at Fort William.

“ The point as to which the Officiating Judges differ is as follows :

“ Whether, in trying the three specific charges of receiving illegal gratifications from the firm of Cohen and Co. at Tonghoo in 1876, evidence of similar, but unconnected, instances of receiving illegal gratifications from the same firm at Thayetmyo in the years 1877 and 1878, is admissible.”

The *Standing Counsel* (Mr. Phillips) for the Crown, contended that the evidence was admissible. The footing on which these

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sums were received may have remained unchanged during the years 1876, 1877, and 1878. It now appears that, in 1878, the footing on which the money was received from the firm of Cohen and Co. by the prisoner was such, that the receipt of the sums was with a corrupt motive; if they were on the same footing in 1876, it would go to show the prisoner's guilt; then it is submitted that the evidence is admissible. [GARTH, C. J.—Could you give evidence to show what happened even at a longer interval, say ten years?] Yes, I submit so. The subsequent conduct of the parties can be looked at to show on what footing Cohen and Co. and the prisoner were. The longer the interval the less would be the probability of the footing having remained the same, and therefore of the evidence being conclusive, but it would be admissible. [GARTH C. J.—Does it not depend on intention? Is there any question of intention here?] Yes, it is submitted there is; see s. 161, Penal Code. [GARTH, C. J.—Suppose a man charged with theft in 1876: the fact of his having stolen something in 1877, a year afterwards, would be no evidence of the former crime.] In that case there would be no constant element: here we have the parties possibly in the same relation to one another, and on the same footing, subject to alteration of place and detail, which would be immaterial. The evidence cannot be said to be absolutely irrelevant. Proof of subsequent utterance of coin or notes is admissible; see Taylor on Evidence, 7th Ed., § 345, though possibly not if the notes or coin were of a different description.—*Id.*, note 1. Thus in *Rex v. Smith* (1) and *Rex v. Taverner* (2), the evidence was held inadmissible on that account. So in *Rex v. Harris* (3). Here the footing was probably the same, therefore, evidence of subsequent illegal receipt of money is admissible. Suppose the footing an innocent one. Might not a prisoner give evidence of the footing on which he stood with another person to show he was innocent? Why can evidence not be admitted of the subsequent footing to prove his guilt? The basis would be the same,—*viz.*, that the footing remained identical. The question here is, not whether the evidence is sufficient to convict, but whether it is absolutely

(1) 4 C. & P., 411.

(2) *Id.*, 413 note.

(3) 7 C. & P., 429.

1881 inadmissible? In the case of *Boddy v. Boddy and Grover* (1),
 EMPRESS evidence of acts of adultery subsequent to the date of the
 v. last act charged was held to be admissible for the pur-
 M. J. VYA- pose of showing the character and quality of previous acts
 POORY of improper familiarity. In the present case what we want
 MOODELIAR. to show is the quality and character of these acts of receiving
 money. We have not a series of isolated acts, but acts which
 must have been done on some footing, which may have remain-
 ed the same throughout. [GARTH, C. J.—The evidence shows
 that the arrangement was changed in 1877.] There is evidence
 here to show that there was a previous agreement for a monthly
 sum, but the purpose is not stated. Now in 1877, the purpose
 appears,—may evidence not be given to connect them? They are
 probably parts of a continuous transaction. Under the Evi-
 dence Act, s. 6, this evidence would be admissible. It would be
 for a jury to say if the acts were done on the same footing, and
 if this evidence is excluded, the jury would be prevented entirely
 from finding out what the footing was on which the parties were
 in 1876, so as to see if the footing was the same. Sections 8, 9, 14,
 and 15 of the Evidence Act were also referred to, and it was
 contended the evidence was relevant also under those sections.

Cur. adv. vult.

The following judgments were delivered :—

GARTH, C. J. (MACLEAN, J., concurring).—The prisoner in this case was tried before the Special Court at Rangoon upon three charges for receiving money illegally as a public servant, contrary to the provisions of ss. 161 and 165 of the Indian Penal Code.

The transactions upon which the charges were based are all said to have occurred in the year 1876, and the nature of them was, that the prisoner, being then the managing clerk in the Commissariat office of Tonghoo, where Messrs. Cohen Brothers carried on business as Commissariat contractors, accepted certain remuneration from Messrs. Cohen for services, which he is said to have rendered them in his official capacity.

The case for the prosecution was, that these services were rendered, and the remuneration received, by the prisoner under some arrangement, which existed between the parties in the year 1876, but which came to an end in January 1877.

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In the year 1877, the prisoner was transferred to the Commissariat office at Thayetmyo; and it was alleged by the prosecution, that in that year Messrs. Cohen, who also carried on business as Commissariat contractors at the latter place, made a similar arrangement there with the prisoner, and that certain sums were given to him as remuneration in that year for similar services.

Upon the trial evidence was adduced on the part of the prosecution, to show the receipt of these sums and the existence of this arrangement in 1877. But the learned Judges in the Special Court differed in opinion as to whether the evidence was admissible, and therefore, under s. 80 of the Burma Courts Act, they have referred the question to us in the following terms (*reads the point referred*).

It has been contended by Mr. Phillips for the Crown, that the evidence was admissible under some one or more of the sections from 5 to 14 of the Evidence Act, as showing the illegal nature of the transactions between Messrs. Cohen and the prisoner in 1877, and the probability that, if sums were received by the prisoner from them for an illegal consideration in that year, the sums which were received from them by the prisoner in the previous year, were also for an illegal consideration.

I believe that we are all agreed that this evidence was not admissible under any of the sections from 5 to 13 of the Evidence Act; but my brother Mitter is of opinion, that it might be admissible, under s. 14 upon the grounds stated in his judgment.

After carefully considering this point, and the authorities to which our attention was called by Mr. Phillips, I have come to the conclusion that the evidence was not admissible.

Section 14 seems to me to apply to that class of cases which is discussed in Taylor on Evidence, 6th edition, ss. 318 to 322,—that is to say, cases where a particular act is more or less criminal or culpable, according to the state of mind or feeling of the person who does it; as for instance in actions of slander or

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false imprisonment, or malicious prosecution, where malice is one of the main ingredients in the wrong which is charged, evidence is admissible to show that the defendant was actuated by spite or enmity against the plaintiff; or again, on a charge of uttering counterfeit coin, evidence is admissible to show that the prisoner knew the coin to be counterfeit, because he had other similar coin in his possession, or had passed such coin before or after the particular occasion which formed the subject of the charge. The illustrations to s. 14, as well as the authorities cited in Taylor, show with sufficient clearness the sort of cases in which this evidence is receivable.

But I think we must be very careful not to extend the operation of the section to other cases, where the question of guilt or innocence depends upon *actual facts*, and *not upon the state of a man's mind or feeling*. We have no right to prove that a man committed theft or any other crime on one occasion, by shewing that he committed similar crimes on other occasions.

Suppose for example, that usury was a crime by the law of this country, and that a prisoner was charged with having taken usurious interest from A B in a transaction which occurred in 1870. It seems quite clear to me, that, for the purpose of proving the nature of this transaction in 1870, evidence could not be given of some other usurious transaction having taken place between the same parties in 1871. The question in such a case would be, not whether the prisoner had a mind prone to the commission of usury, or whether he was in the habit of making usurious contracts, but whether, in the particular instance, the prisoner had, *in point of fact, been guilty of usury*.

Now, as I understand, the argument for the Crown in the present case amounts to this. In the year 1876, Messrs. Cohen were commissariat contractors at Tonghoo, and the prisoner was the managing clerk in the Commissariat. In the year 1877, these parties were employed respectively in the same way at Thayetmyo. In the year 1876, the prisoner is charged with receiving certain sums of money as bribes from Messrs. Cohen, for showing them some favour in his official capacity, and he is proved to have actually received those sums. Under these circumstances, Mr. Phillipa argues, that evidence is admissible that

in the year 1877 he received other sums from Messrs. Cohen as bribes, in order to prove that the sums which he received in 1876 he also received as bribes. But it seems to me, that the question, whether he took the sums in 1876 as bribes for doing a favor to Messrs. Cohen, is in each case purely a question of fact. It is not, as it seems to me, a matter of intention, or feeling, or knowledge; and I think that, in such a case evidence is no more admissible to show that he took bribes from Messrs. Cohen in 1877, than it would be to show that he stole some of the Government money in 1876, because he afterwards stole some in 1877.

I would, therefore, answer the question referred to us by saying that, in my opinion, the evidence is not admissible.

MITTER, J.—The facts of the case in which this reference has been made are briefly these:—

The accused was committed for trial on twelve separate charges of receiving illegal gratification, as a public servant, under ss. 161 and 165, the receipt of these several sums of money extending over a space of three years, 1876, 1877, and 1878.

At the trial the prosecution elected to proceed on three charges. The transactions out of which they are alleged to have arisen all happened in the year 1876. The accused was the managing clerk in the Commissariat office at Tonghoo in the year 1876, where Cohens transacted business as commissariat contractors. The evidence for the prosecution is, that there was an understanding between Cohens and the accused, under which he had agreed for certain remuneration to show to them certain favour in the exercise of his official functions; that this agreement came to an end in January 1877, when the accused was transferred to the Commissariat office at Thayetmyo; that in the month of June of that year the Cohens, who also transacted business as commissariat contractors at the latter place, entered into a similar agreement with the accused, and the evidence of payments of money to him in 1877 and 1878 at Thayetmyo, under the last mentioned agreement, was adduced in the course of the trial. The question of law that has been referred to us is as follows (*reads the point referred*).

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I am of opinion that receipt of illegal gratification in the years 1877 and 1878 at Thayetmyo cannot be proved, in order to establish that the accused *received* the three sums of money mentioned in the charges for which he was tried. The two sets of transactions are not so connected as would make them relevant to one another within ss. 5 to 13 of the Evidence Act. Section 6 cannot apply, because the payments of 1877 and 1878 are not so connected with the facts in issue in this case as to form part of the same transaction. The alleged agreement of 1876, according to the case for the prosecution, came to an end in January 1877, and the alleged payments in 1877 and 1878 were said to have been made under a different understanding.

The next section, under which it was contended, in the lower Court, that the transactions in 1877 and 1878 were relevant, was s. 8. But it seems to me that it cannot be said that they show or constitute a motive or preparation for the facts in issue. Neither can the conduct of the accused, as shewn in the alleged transactions of 1877 and 1878, be said to have been influenced by the facts in issue in the sense in which these words are used in the section. No doubt, a person who commits a crime with impunity, may ordinarily be found more ready to commit another crime of a similar nature, and in that sense the second crime may be considered to have been influenced to a certain extent by the commission of the first crime. But it seems to me that that kind of connection is not contemplated by this section. If it did, then where a person is charged with an offence, the whole of the previous history of his life would be relevant, because, every event of his life that preceded the commission of the crime, may be considered to have influenced it in some way. But that is not the meaning of the section. The influence referred to here must be direct and obvious; and in this sense I cannot say that the transactions of 1877 and 1878 were in any way influenced by the facts in issue. The same observation will apply to the contention based upon s. 11. There also the words "*highly probable*" point out that the connection between the facts in issue and the collateral facts sought to be proved must be so mediate as to render the co-existence of the two *highly probable*.

The only other section which it is necessary to notice is s. 14. Under that section collateral facts specified therein can be proved if the question be as to the existence of any state of mind. In this case if the receipt of the several sums of money mentioned in the charges be considered to have been proved to the satisfaction of the Court by *other* evidence, and if it be necessary to ascertain whether the accused *received* them as a *motive* for showing favor in the exercise of his official functions, the alleged transactions of 1877 and 1887 may, in that case, be relevant under this section. But they are not relevant for the purpose of establishing the *fact* of payment in the year 1876.

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Before Mr. Justice Wilson.

SOOBHUL CHUNDER PAUL v. NITYE CHURN BYSACK.

1880
Aug. 21.

Attaching Creditor—Right to Redeem Mortgage—Civil Procedure Code (Act X of 1877), ss. 276, 282, 295.

An attaching-creditor has not, as such, any right to redeem a mortgage subsisting prior to his attachment.

THE facts of this case sufficiently appear from the judgment.

Mr. Jackson and Mr. Trevelyan for the plaintiff.

Mr. Kennedy and Mr. Phillips for the defendant.

WILSON, J.—The plaintiff obtained a decree against one Kristo Chunder Chowdry; and, in execution of that decree, he attached a house of his judgment-debtor. The defendant held a mortgage of the house. The plaintiff in this suit claims to redeem that mortgage.

The case came on for settlement of issues. The first question that arises is, whether an attaching-creditor is entitled, as such, to redeem a mortgage subsisting prior to his attachment.

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If this question be answered in the negative, it is unnecessary to consider any of the other questions of law or of fact which have been raised.

The position of an attaching-creditor and his rights with respect to the land are dependent entirely upon certain sections of the Civil Procedure Code. The governing section is s. 276: "When an attachment has been made by actual seizure or by written order duly intimated and made known in manner aforesaid, any private alienation of the property attached, whether by sale, gift, mortgage, or otherwise, and any payment of the debt or dividend, or a delivery of the share to the judgment-debtor during the continuance of the attachment, shall be void as against all claims enforceable under the attachment." The attaching-creditor may follow up his attachment by sale. And in that case, he and all other creditors who obtain orders of attachment before realization will share the proceeds rateably; s. 295.

Under English law, as a general rule, any person interested in the equity of redemption may redeem. The interest may be limited in time, as an estate for life or perpetual. It may be limited to a portion of the land, or affect the whole of it. The person so interested is entitled to redeem, subject of course to the equities of all other persons interested—*Pearce v. Morris* (1). I do not think that the interest of an attaching-creditor is an interest at all closely similar to those which have been held to give a right to redeem. There is no analogy between the position of an attaching-creditor here and that of an execution-creditor in England. Under English law, in case of a legal interest in real property, the creditor takes under his *elegit* an actual legal estate in the land as tenant by *elegit*, and receives satisfaction out of the rents and profits. An equity of redemption being, not a legal but an equitable interest, is not affected by an *elegit*, and the intervention of a Court of Equity is requisite to make it available in execution. But when an order of Court has been obtained, the interest taken by the execution-creditor is closely analogous to that of the tenant by *elegit*. In this country the attaching-creditor

(1) L. R., 5 Ch., 227.

neither has, nor can ever as such acquire, any beneficial interest in the property attached.

But the Code has not left the matter to rest upon general principles. It has dealt expressly with the attaching-creditor's rights in relation to mortgages, and an examination of the clauses bearing upon the matter makes it, I think, tolerably clear, that the Legislature did not intend to give an attaching-creditor the right to redeem a mortgage.

Mortgages are dealt with in two sections. Section 282 is one of a group of sections which deal with claims raised adversely to the attaching-creditor. It says,—“ If the Court is satisfied that the property is subject to a mortgage or lien in favor of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or lien.” If it had been intended that the attaching-creditor should have the alternative right to redeem the mortgage, it must, I think, have been so stated.

Mortgages are again dealt with in s. 295, a section whose subject is the sale of properties attached. It says,—“ provided that, when any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not as such be entitled to share in any surplus arising from such sale.” “ Provided also that when any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the assent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same right against the proceeds of the sale as he had against the property sold.” Here again, if it were intended that the attaching-creditor should have a right to redeem, I think it must have been so said.

The first paragraph of the same section confirms this view. It prescribes how the proceeds of an execution are to be applied: “ Whenever assets are realized by sale or otherwise in execution of a decree, and more persons than one have, prior to the realization, applied to the Court by which such assets are held for execution of decrees for money against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting costs of the realization, shall be divided

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rateably among all such persons." It cannot be supposed that the attaching-creditor is to be at liberty to take an assignment of the mortgage, and then sell, subject to the mortgage, retaining the mortgage for his own benefit. But if he is to sell the property discharged from the mortgage, how is he to get credit for what he has paid to discharge it? It would, I think, be a strained construction of the words "costs of realization" occurring in the context in which they do, to make them include a mortgage debt paid off.

I am of opinion that an attaching-creditor has not, as such, any right to redeem a mortgage.

This suit will, therefore, be dismissed with costs on scale No. 2.

Suit dismissed.

Attorney for the plaintiff: Mr. Goodall.

Attorney for the defendant: Baboo B. M. Doss.

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Field.

1880
Dec. 22.

AKBUR ALI (PLAINTIFF) v. BHYEA LAL JHA AND OTHERS
(DEFENDANTS).*

Onus of Proof—Suit to have certain Lands declared Mâl—Documents once received without objection by lower Court.

Where it is admitted that the defendants hold certain lands within the plaintiff's zemindari, some at least of which are rent-paying; the defendants, if desirous of proving that any of these lands are rent-free, are bound to give some *primâ facie* evidence of the fact, before they can call upon the plaintiff, the zemindar, to prove that the whole or any part of the lands are mâl.

* Appeal from Appellate Decree, No. 1787 of 1879, against the decrees of F. Cowley, Esq., Judge of Purneah, dated the 28th May 1879, affirming the decree of Baboo Prosunno Coomar Bose, Munsif of Arrah, dated the 12th February 1879.

An Appellate Court has no right to refuse to admit on technical grounds a document which has been received and read in the Court below without objection.

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THE plaintiff, one Akbur Ali, stated that one Bechan Biswas had formerly held a rent-paying tenure within his patni; and that, on the death of Bechan, the land was held by his widow Darshunia and by his brother Lokhun Biswas (the defendants in the suit); that one Bhyea Lal Jha obtained a decree against Darshunia and Lokhun, and in collusion with them, in execution of that decree, caused thirty-five bighas of Bechan's tenure, containing four distinct plots, to be sold on the 16th August 1877 as a rent-free holding, and that at such sale Bhyea Lal Jha himself became the purchaser.

On the 7th August 1878, the plaintiff brought the present suit, asking that the lands in question might be declared to be his māl lands, and that the sale of August 1877 might be reversed, and for the ejectment of the defendants from these lands. Bhyea Lal Jha contended, that plots 1 and 2 and 4 in the lands in question were milik, and not māl lands, but that as neither the plaintiff nor his superior landlord had claimed the land for more than twelve years before the institution of the suit, the claim was barred; and that lot No. 3 was māl, but that he had relinquished it to the plaintiff. The other defendant did not enter appearance.

The Munsif held, that the onus of proving the lands to be māl was on the plaintiff, and that he had failed to establish that fact; and further found that, on the evidence adduced by the defendants, plots Nos. 1, 2, and 4 were rent-free lands, and that the plaintiff had failed to prove that he had realized rent for these lands within twelve years preceding the suit; and that, therefore, the suit was barred.

The plaintiff appealed to the District Judge, who held that the onus of proof lay on the plaintiff, and that he having failed to adduce proof that the lands included in plots 1, 2, and 4 were māl, he dismissed the suit; that as regarded plot No. 3, it was admitted that it was māl, but as that plot appeared to be a portion of the rent-paying tenure of Bechan, and as the holders

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had a right of occupancy, no decree for possession could be made as to that plot. In the course of the hearing, he refused to take as evidence certain copies of chakbunds, which had been admitted without objection as evidence in the lower Court, in the absence of the original documents and of proof of the circumstances under which secondary evidence could be given.

The plaintiff appealed to the High Court.

The defendants filed cross-objections as to the question of the admission of the documents last mentioned.

Moonshee Mahomed Yusuff for the appellant.

Baboo Taruck Nath Sen for the respondents.

The following judgments were delivered :—

GARTH, C. J.—I think that this case ought to go back to the Court below for retrial.

It seems to me that the lower Appellate Court has thrown the burden of proof upon the wrong party.

The suit is brought to have it declared that four plots of land, which lie within the zemindari of which the plaintiff is the patnidar, are the mâl lands of the zemindari; and the occasion which gave rise to the suit is this :

The defendants Nos. 2 and 3 were the tenants to the plaintiff of a large portion of land within the zemindari; and a judgment was obtained against them by the defendant No. 1, under which certain plots of land lying within the ambit of the zemindari, and as far as we know, within the ambit of the lands held by the defendants Nos. 2 and 3 as tenants to the plaintiff, were sold as being the rent-free lands of the defendants Nos. 2 and 3; and they were bought by the defendant No. 1. The plaintiff, therefore, brings this suit to have those plots declared to be his mâl lands.

Assuming that these plots were within the ambit of the land which was held by the defendants Nos. 2 and 3 as the plaintiff's tenants, I think that the rule that has been applied to enhancement suits would also apply here,—namely, that it being admitted that the defendants hold lands within the zemindari, some of which at least are rent-paying, if they want to show that any

of those lands are rent-free, they ought to give some *primâ facie* evidence of it, before they can call upon the zemindar to prove that the whole or any part of the lands are mâl (see Full Bench case of *Gooroo Persad Roy v. Juggobundoo Mozoomdar* (1), *Nehal Chunder Mistree v. Huree Pershad Mundul* (2), and *Beebee Ashrufoonissa v. Umung Mohun Deb Roy* (3). The plots in dispute are numbered 1, 2, 3, and 4; and with regard to plot No. 3, it is now admitted that it belongs to the plaintiff.

The question remains with regard to plots Nos. 1, 2, and 4. Those plots were shown to the satisfaction of the first Court to be rent-free; and accordingly that Court, as to those plots, dismissed the suit. The lower Appellate Court, on the other hand, appears to have thrown the burden of proving that those plots are mâl upon the plaintiff. The Judge, no doubt, goes into the question, whether the defendant has given any proof that the plots in question are rent-free; but the evidence upon that head is, to say the least of it, unsatisfactory, and it seems very doubtful whether he really intended to find that the defendant made out a *primâ facie* case that they were so. In the latter portion of his judgment he certainly says, that "the burden of proof lies entirely upon the plaintiff;" and if he has acted upon that principle, it appears to me that he has not tried the case.

If the fact is, as I understand it to be, that the plots in question adjoin, or are contained within the ambit of, the land held by the defendants Nos. 2 and 3 as tenants, then the defendant No. 1 must first satisfy the Court by *primâ facie* proof that those plots, or some or one of them is rent-free. If he does so, then the onus of proof will be thrown upon the plaintiff to prove such plot or plots to be mâl.

Then there have been cross-objections filed by the defendant with reference to certain documents, which appear to me to call for some notice from the Court.

The defendants filed copies of chakbunds dated respectively the 5th of Kartick, the 11th of Zikand, and the 29th of Ramzan 1168, and also the copy of a sanad dated 4th Bysack 1168. As far as I can see, the first Court admitted copies of these documents as evidence without any objection being made by the

(1) W. R., Sp. No., 15. (2) 8 W. R., 183. (3) 5 W. R., Act X Rul., 48.

1880 other side; and if it did, then the lower Appellate Court had
 AKBUR ALI no right to reject them *as inadmissible*, because it is clear that
 v. where copies of documents are admitted and read in the Court
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 sibility can afterwards be taken in a Court of Appeal.

"I observe," he says, "that in the absence of the original documents, and of proof of the circumstances under which secondary evidence could be given, these go for nothing." By this I understand him to mean, that as the originals of these documents were not produced, and as no facts were proved which would justify the Court in receiving secondary evidence of them, they ought not to have been admitted in the lower Court; and consequently the Court of Appeal is bound to reject them. Now, in this he was clearly wrong. Of course the Appeal Court has a perfect right to attach such weight to the documents as it thinks proper, or to say whether they ought to be treated as evidence as against particular parties to the suit; but it has no right to refuse to admit on technical grounds a document which has been received and read in the Court below without objection. The case will go back to the Court below to be tried again with reference to the above remarks; and the costs in both Courts will abide the result.

FIELD, J.—The plaintiff in this case is the patnidar of Talook Danti Maldwar. One Bechan Biswas held a considerable jote within that patui. Bechan Biswas is dead, and has been succeeded by his widow Darshunia and his brother Lokhun. Bhyea Lal Jha, the defendant No. 1, in execution of a decree against Darshunia and Lokhun, brought to sale, and himself purchased, four plots of land, which form the subject of this suit. These plots were sold and purchased as lakhiraj lands; but the plaintiff in the present case contends that they are not lakhiraj but māl lands; and he brings this suit to obtain a declaration "to this effect and to recover possession of the land comprised in the four plots."

As to plot No. 3, the real defendant Bhyea Lal Jha does not now contend that it is milik or lakhiraj land; and in respect of this plot the decree ought to be a simple declaration that the land comprised therein is māl land.

With respect to plots 1, 2, and 4, the first point to be considered is, whether the District Judge has rightly started by casting the entire burden of proof upon the plaintiff. It appears to me that he has not. The person under whom Bhyea Lal Jha claims title, was admittedly a tenant of the plaintiff for a considerable portion of land, and the substantial allegation of Bhyea Lal Jha is, that a certain other portion of land within the same zemindari and in the occupation of the same tenant is not *mâl* but *lakhiraj*.

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It appears to me that the Full Bench decision quoted by the District Judge is applicable to those cases only in which the zemindar sues to resume or assess land held under a *lakhiraj* title (alleged invalid), such land being either held by a person who is not a tenant of the plaintiff for other land, or being occupied as a separate parcel or holding, or otherwise in such a manner as to be entirely distinct from any other land held by the same person as a tenant under the plaintiff.

There are a number of decisions of this Court, which go to establish the proposition that this principle is not applicable to the case of a person who is admittedly a tenant of the zemindar, and who sets up the plea of *lakhiraj* in respect of a portion of the land held by him, which portion is not distinguished in the manner which I have described from the rest of the land, as to which he admits a tenancy.

Now, in this case it has been contended, that these four plots of land are so distinct from the land which constitutes the *jote* of Bechan Biswas that the principle of the Full Bench decision ought to apply. The pleader who has put forward this contention has, however, been unable to point out to us upon the map that these four plots constitute a separate holding of this nature, and therefore I think that the case falls within the principle to which I have adverted, and that it lay upon Bhyea Lal Jha, claiming title under Bechan Biswas, to start his case by giving some *prima facie* evidence that these plots, Nos. 1, 2, and 4, are *lakhiraj*.

The District Judge must, therefore, in the first place, consider whether this *prima facie* evidence has been given, and then proceed to consider whether the plaintiff has or has not suffi-

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ciently rebutted such *prima facie* evidence. In considering whether the defendant has given such *prima facie* evidence, the plot No. 2 and the plots Nos. 1 and 4 will have to be separately considered. As to plot No. 2, the District Judge was of opinion that the oral evidence without further corroboration was not sufficient to show that the land was *milik* or *lakhiraj*. As to plots Nos. 1 and 4, the Judge was of opinion that the oral evidence was corroborated by a map and *khusra*, which showed that these plots were, on a previous occasion, measured as rent-free lands of Bechan Biswas. It has been admitted at this hearing that as the map and *khusra* contain no boundaries, and as no local investigation was made by an *Amin* in order to identify plots 199 and 201 with plot No. 1 of the plaint, and plot No. 50 of the map and *khusra* with plot No. 4 of the plaint, it is impossible to say from a mere inspection of the map and *khusra*, and a comparison of them with the plaint, that the lands are identical. It follows that, in respect of plots 1 and 4, the corroboration relied upon by the District Judge fails; and he must, therefore, see whether in respect of those plots the rest of the evidence to be found in the case satisfies him that the defendant has established a *prima facie* case of *lakhiraj*.

With reference to the copy of the *chakbund* dated the 5th Kartick 1168, and of another dated the 11th Zikand 1168, and of a third dated 29th Ramzam 1168, and also the copy of a *sanad* to one *mehal* dated 9th Bysack 1168, we think it right to say that the parties ought to have an opportunity of producing any such additional evidence as may have the effect of supplying any link of proof which may be desirable from those documents. There is nothing on the face of those papers to show exactly under what circumstances the *chakbunds* were made, and we abstain from pronouncing any opinion as to the weight which ought to be attached to them when they are connected by such additional evidence with the land in question. The plaintiff will also be at liberty to adduce fresh evidence to rebut any evidence which may be produced by the defendant as to these *chakbunds* and *sanads*.

Appeal allowed, and case remanded.

Before Mr. Justice Cunningham and Mr. Justice Broughton.

MADHUB DOSS AND OTHERS (DEFENDANTS) v. JOGENDRO NATH
ROY (PLAINTIFF).*

1881
Jan. 31.

*Beng. Act VIII of 1869, ss. 38, 40—Order that Tenures have lapsed—
Procedure to enforce Attendance of Witnesses in Proceedings for Measure-
ment of Lands.*

The Collector, in proceedings for measurement of lands under s. 38 of Beng. Act VIII of 1869, cannot be said to have made a "due enquiry," and therefore should not make an order under that section that the tenures have lapsed, until he has made use of all the powers given him by s. 40 in order to procure the attendance of witnesses.

ON the application of the plaintiff in proceedings taken under s. 38 of Beng. Act VIII of 1869, an Amin was appointed to measure the lands on an estate of which the plaintiff was the proprietor; the Amin went to the spot on the 15th of March and remained until the 1st June, but none of the defendants, the ryots on the estate, except two, Bechu and Namdah, would attend, notwithstanding notices were served on them, both by the Amin and by the Collector. As they did not attend, the Collector made an order under s. 38 of the above Act, that the tenures, otherwise than those of the two defendants who attended, had lapsed.

From this order the defendants appealed.

Baboo Kally Mohun Doss and Baboo Bungshee Dhur Sen for the appellants.

Baboo Mohesh Chunder Chowdhry, Baboo Mohing Mohun Roy, and Baboo Rashbehary Ghose for the respondent.

The judgment of the Court (CUNNINGHAM and BROUGHTON, J.J.) was delivered by

CUNNINGHAM, J.—The first objection in this case is, that

* Appeal from order No. 277 of 1880, against the order of Baboo B. P. Roy, Subordinate Judge of Burdwan, dated the 6th July 1880.

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the Court below ought not to have granted the application of the respondent without better evidence of the inability of the applicant to measure the lands, and without ascertaining who are the persons liable to pay rent.

It appears that the respondent, who is the proprietor of the land in question, filed a verified petition, in which he stated that he had endeavoured to measure the land, and had been unable to do so; and that thereupon the Court below made the order under s. 38 of Beng. Act VIII of 1869, now appealed against. We think that that was a rightful proceeding, and that there is no ground for setting aside the order on that account.

But with regard to the procedure adopted by the Collector, we are not satisfied that there was a "due enquiry" sufficient to comply with the requirements of s. 38.

That section is a highly penal one, and we are bound to construe it with the utmost strictness. It appears that, by s. 40, the Collector, in conducting an enquiry of this kind, is empowered to make use of all the powers conferred on a Civil Court by the Code of Civil Procedure in procuring the attendance of witnesses and otherwise taking evidence.

Now, it does not appear that the Collector in this case did put that section in force, or make use of all the powers which the Code gives a Civil Court to procure the attendance of witnesses. The consequence is, that if we upheld the present decision, we should be enforcing a very severe penalty against the witnesses, whom the Collector might, if he had chosen to exercise the powers vested in him by law, have brought before the Court, and thus avoided the penalty coming into force.

Under these circumstances, we think that the order appealed against should be set aside, and the Collector directed to institute another enquiry, using all the powers that the law gives him to bring the witnesses before him. If he is still unable to ascertain and record who the persons in occupation of the land are, and to measure the land, he will then be at liberty to make the lapsing order under s. 38.

Appeal allowed.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Broughton.

IN THE MATTER OF UPENDRO LALL BOSE, AN ATTORNEY.

1880
Aug. 14 &
Sept. 3.

Practice—Verification of Plaintiff—Information and Belief—Personal Knowledge—Civil Procedure Code (Act X of 1877), ss. 50, 51—Act XII of 1879, s. 11.

In all cases, whether a plaintiff is verified by the plaintiff or by some other person, the party verifying should state shortly what paragraphs he verifies of his own knowledge, and what paragraphs he believes to be true from the information of others.

IN this case a rule had been obtained calling upon Baboo Upendro Lall Bose, an attorney of the High Court, to show cause why he should not be suspended from practising for having improperly verified a plaintiff in the suit of *Jodoonath Law v. Prokash Chunder Mitter*. The plaintiff in that suit, which was for an account and for sale of certain properties and for other relief, stated an assignment by the defendant to one Mohindro Lall Mitter of the share of the defendant in certain Government securities and in certain zemindaries, and a subsequent assignment by the defendant to the plaintiff of the balance of his share in the same properties after payment of the amount due to Mohindro Lall Mitter. The plaintiff further stated that notice of the assignment had been given to the karta of the family to which the defendant belonged, and also to Mohindro Lall Mitter; that the defendant had subsequently conveyed the whole of his property to one Rajendro Dutt, who had paid off Mohindro Lall Mitter; and that there was a sum of Rs. 2,091-8 due to the plaintiff for principal and interest. The plaintiff was signed by Jodoonath Law by his constituted Attorney Upendro Lall Bose.

The verification was as follows:—"I, the plaintiff abovenamed, do declare, that what is stated in the foregoing plaintiff is true

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to my knowledge, except as to matters stated on information and belief, and as to those matters I believe it to be true.

JODOONATH LAW,

by his constituted Attorney,

Upendro Lall Bose.

At the hearing of the suit, Upendro Lall Bose was called as a witness by the Court and stated as follows:—

“ About two years ago, Brojonath Sen called at my house and enquired about a certain deed of assignment executed by Prokash Chunder Mitter in favour of Mohindro Lall Mitter, and after that told me to draft a deed, and said three promissory notes were owing. I did draft the deed. I don't know what took place with the draft, which I handed to Brojonath Sen, after that. It might be at the beginning of August. Brojonath Sen produced *A* (the first deed) to me, and told me to take notice of it. Prokash was not there. It was produced to me at my house. I did not see it executed or any money lent. It was brought to me after execution to give me notice of its execution as I was acting for Mohindro Lall Mitter. I verified the plaint as the constituted attorney of Jodoonath Law from information I received. I state about the execution of the deed from information. I was told by Brojonath Sen about its execution. When the plaint was drawn I was not constituted attorney. The verification is in the usual form. I got the power in January or December, and the plaint was drawn in September. I am an attorney of this Court. I only knew personally about the execution of the first deed in favour of Mohindro Lall Mitter. I also know of the notice given by Brojonath Sen of the execution of *A* to me as attorney of Mohindro Lall Mitter. I have not compared *A* with the draft. I drafted it at home, and made the draft over immediately to Brojonath Sen. I know the contents of the fourth and fifth paragraphs of the plaint from information and belief. The first paragraph I know personally. As to the second, I know I drafted the deed, and the rest I know from information received from Brojonath Sen. I did not compare the draft with *A*. I speak from recollection that it

corresponds with my draft. As to the third, fourth, and fifth paragraphs, I make the statements from information received, as to the sixth paragraph that appears on the face of the deed and from calculations made from it. The plaintiff resides in Aheercoetollah Street in Calcutta. I cannot say how long he has resided there. When the plaint was filed he was residing at Bankipore. I cannot say how long he had been there. I was told he was ill by Brojonath Sen."

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Mr. *Kennedy* and Mr. *Hill* showed cause.

The judgment of the Court (GARTH, C.J., and BROUGHTON, J.) was delivered by

GARTH, C. J.—There is no doubt that the plaint in this case has been verified in an irregular way; but having heard Mr. *Kennedy's* explanation, we have already informed him, in the course of the argument, that we entirely acquit his client of any intentional impropriety.

The mistake which he has made in the form of verification has evidently arisen from his confounding the permission to verify the plaint itself, which is provided for by s. 51 of the Code, with the power to sign the plaint on behalf of his client, which is provided for in the addition to that section made by the amending Act XII of 1879, s. 11.

He obtained leave upon the usual petition to verify the plaint himself, and then, instead of doing so, he signed the plaintiff's own name to the verification, describing himself as the plaintiff's attorney for that purpose.

The result is, that neither the plaintiff nor his attorney could be made criminally responsible for any false statements there may be in the plaint.

If Upendro Lall Bose really meant, having obtained the leave of the Court for that purpose, to verify the plaint himself, he should have signed the verification on his own account, and not as the plaintiff's attorney.

If he meant to sign the verification merely as the plaintiff's attorney, the plaintiff himself ought to have seen the plaint and verification, and authorized the attorney to sign the verification for him.

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The discussion which has taken place upon these points has raised a question of very general importance as to what should be the form of verification. We have taken occasion to consult some of the other Judges upon it, and we think that it may probably be found necessary to frame a rule or rules upon that subject. Meanwhile, we think that, in all cases, whether the plaint is verified by the plaintiff or by some other person, the party verifying should state shortly what paragraphs he verifies of his own knowledge and what paragraphs he believes to be true from the information of others.

This is the form of verification used in affidavits for the purpose of interlocutory applications (see s. 196 of the Code of Civil Procedure). There is no inconvenience, so far as we are aware, in adopting it, and it is really the only means of securing anything like truthful statements in the plaint.

The rule against Upendro Lall Bose will, of course, be discharged, and he is entirely acquitted of all blame which can affect his character.

SMALL CAUSE COURT REFERENCE.

Before Sir Richard Garth, Kt, Chief Justice, and Mr. Justice Pontifex.

1881

Feb. 8.

BUDDREE DOSS AND OTHERS v. RALLI AND ANOTHER.*

Contract—Breach of Contract—Time for Performance.

A contract for the sale of seed contained the following provision:—"Refraction guaranteed at four percent., with usual allowance up to six per cent., exceeding which the seller is to reclean the seed at his expense within a week; failing which buyers to have the option of cancelling that portion of the contract tendered, or of buying against the seller, or of taking the parcel as it stands, with usual allowance for excess refraction. Delivery from seller's godown in pile up to the 15th of July next." On the 10th July, the vendor tendered the seed. On examination the refraction was found to be above the contract rate. It was agreed that the vendor should reclean the seed; and on

* Case stated for the opinion of the High Court under the provisions of Act XXVI of 1864 by H. Millett, Esq., First Judge of the Calcutta Court of Small Causes.

the 13th July, the purchasers went to take delivery of the seed, which was found still to be not sufficiently cleaned. On the 15th July, the vendor said that he should require a week longer for that purpose. The purchasers then cancelled the contract. In a suit by the vendor for damages for breach of contract,—

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Held—(1), that the breach of the contract was with the plaintiff:

(2), that the week allowed for recleaning commenced from the 10th July; and that as the plaintiff had not succeeded in reducing the rate of refraction to the contract rate, the defendants had a right to reject the seed; and that the plaintiff was not entitled to further time to reclean it again.

THIS was a suit to recover damages for the breach of a contract dated the 8th June 1880 for the purchase of a hundred tons of teal seed. The contract contained the following provision:—“Refraction guaranteed at four per cent., with usual allowance up to six per cent., exceeding which the seller is to reclean the seed at his expense within a week; failing which buyers to have the option of cancelling that portion of the contract tendered, or of buying against the seller, or of taking the parcel as it stands, with usual allowance for excess refraction. Delivery from seller's godown in pile up to the 15th of July next.” On the 10th July, the defendants went to take delivery, and found that the refraction of the seed tendered was over the contract rate. It was then agreed that the seed should be recleaned. On the 13th July, the defendants went again to take delivery, and found that the refraction was still over the contract rate. On the same day the plaintiffs wrote to the defendants asking them to take delivery. On the 14th July, one of the plaintiffs had an interview with the broker who had negotiated the contract, when he said that he would require another week to clean the seed. A meeting at the defendants' office was arranged for the next day. At this meeting, Buddree Doss, who represented the plaintiffs, asked for another week's time to reclean. This was refused. On the same day the defendants made an attempt to tender the price, but it was not successful. In the evening the plaintiffs' attorney wrote to the defendants requiring them to take delivery, and the defendants wrote to the plaintiffs tendering the price of the goods and asking for delivery, and notifying that if the delivery was not completed

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they would consider the contract as cancelled. The plaintiffs now sued for the difference between the market-rate and the contract price, and contended that as they had one week within which to perform the contract, they had up to the 22nd July within which to deliver the goods, if previous to the 15th they turned out to be above the stipulated refraction. The learned First Judge of the Small Cause Court, however, held, that the meaning of the contract was, that the plaintiffs were entitled only to one week from the time when the refraction was ascertained to be above the rate mentioned in the contract, and that they were not entitled to reclean as often as they liked, and then to take the week over and above the due date of the contract; and, contingent upon the opinion of the High Court on the following questions, gave judgment for the defendants:—

(1.) Whether the breach of the contract on the evidence before the Court was not clearly with the defendants, the contract providing one week for recleaning, and the evidence being that the plaintiffs were willing, on the 15th July, to reclean within one week?

(2.) Whether the one week for recleaning the seed provided in the contract is to commence from the 16th July, or from any prior date according to the construction of the contract?

Mr. T. A. Apcar for the plaintiffs.

Mr. Agnew for the defendants.

The opinion of the Court (GARTH, C. J., and PONTIFEX, J.) was delivered by

GARTH, C. J.—We think that the first question should be answered in the negative.

As to the second question, we think that the week allowed for recleaning the seed commenced from the 10th July, when the refraction was found to be thirteen per cent. The time occupied by the plaintiffs in recleaning was only two days; but as they did not succeed in reducing the refraction to the rate of six per cent., the defendants had a right to reject the seed.

It is clear that the plaintiffs were not entitled by the terms of the contract to any further time to reclean it again.

The defendants are entitled to the costs of this reference.

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Attorney for the plaintiffs : Mr. Camell.

Attorneys for the defendants : Messrs. Sanderson & Co.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

JUGGERNATH KHAN AND OTHERS (DEFENDANTS) v. J. E.
MACLACHLAN (PLAINTIFF).

1881
Jan. 11.

Contract, Construction of—"Delivery in whole of November on seven days' notice from Buyer"—Breach of Contract.

A contract for delivery by the defendants to the plaintiff of 1,000 bags of ginger, stated that "delivery was to be taken and given in the whole of November on seven days' notice from the buyer." On the 5th November, the plaintiff gave notice to the defendants requiring delivery to be given "within seven days;" and again on the 11th, that he was prepared to take delivery on the following day. On the 12th, the defendants wrote to the plaintiff, stating that they would give delivery on the 28th, 29th, and 30th November. On the 15th, the plaintiff gave notice that he considered the contract at an end. In a suit for damages for non-delivery,—*Held* (affirming the decision of the Court below), that the words "on seven days' notice from the buyer" were intended to give the buyer the right of fixing the particular time in November at which the delivery was to commence, and that the defendants were therefore bound to commence delivery on the expiration of the seven days' notice.

APPEAL from a decision of BROUGHTON, J., dated the 29th June 1880.

The suit was brought for damages for non-delivery of 1,000 bags of dry ginger under a contract dated the 11th October 1879, which stated that the defendants agreed with the plaintiff for the sale by them to him of 1,000 bags of dry ginger at the

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rate of Rs. 5-11 per bazar maund, "delivery to be taken and given in the whole of November 1879 on seven days' notice from the buyer."

The only question material to this report is as to the construction to be put on these words.

On the 5th November, the plaintiff gave notice to the defendants by letter requiring delivery of the ginger to be given "within seven days." On the 11th November, the plaintiff, having heard nothing in the meantime from the defendants, wrote that he should be ready to take delivery on the following day. On the 12th November, the defendants wrote to the plaintiff, stating that they should be prepared, under the terms of the contract, to give him delivery of the ginger on the 28th, 29th, and 30th of November, and that they would pile the ginger on the 27th to avoid any delay in the delivery. On the 15th November, the plaintiff gave notice to the defendants that he considered the contract at an end, and demanded from them the amount now sued for, being the amount of damages he alleged he had sustained by their refusal to commence delivery on the 12th.

Mr. *T. A. Apar* for the plaintiff.

Mr. *Bonnerjee* for the defendants.

The decision appealed from was as follows :—

BROUGHTON, J.—Mr. Bonnerjee contends, that the sellers had from the expiry of the notice to the end of November to deliver, and that they might commence delivery on any day prior to the end of November. Mr. Apar contends, that delivery should commence at the end of the seven days, and go on for a reasonable time. Mr. Bonnerjee puts the case of a contract, supposing it to be without the words "on seven days' notice," and says, that if that were the case they would have all November to deliver: what they contracted for, was for delivery in November with words "on seven days' notice, &c.," in the contract. The construction must depend on the intention

of the contracting parties according to the well-established rule, and the question is what was that intention.

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If the seller is to have the whole of November, those words "on seven days' notice" from the plaintiff in the contract appear to have no meaning. The contract gave the purchaser a right by notice to fix when the delivery should begin. That is a very reasonable and intelligible clause, for when a merchant has to take a large delivery, he must be prepared with accommodation to store the goods in. This view is supported by the conduct of the parties. On the 5th November 1879, Mr. MacLachlan wrote to the sellers and stated that he would be prepared to take delivery of the 1,000 bags of ginger within seven days from the date thereof. He received no reply till the 11th, when he wrote again and very fairly says, that if the defendants considered the contract different from what he contended for, they should have stated that he was mistaken in his construction.

Mr. Bonnerjee quoted *Coddington v. Paleologo* (1) and *Bettini v. Gye* (2). *Coddington's case* appears to me to have the most bearing on the present case, but the words were not identical. The contract was for delivery between 17th April and 8th May. The sellers made no delivery on the 17th. The next day the purchaser rescinded the contract, and an action was brought for non-acceptance, and the Court of Exchequer was divided. The Chief Baron and Baron Parke took one view, and thought that the plaintiff was not bound to give delivery on the 17th April. Bramwell, B., thought that he ought to have commenced delivery on the 17th. Martin, B., agreed, but the Chief Baron did not go as far as Mr. Bonnerjee contends in this case, when he held that the contract was satisfied by the delivery of the whole quantity between the 17th April and the 8th May, inclusive, in such portions and at such intervals as a jury might think reasonable with reference to the nature and effect of the whole contract.

Bettini v. Gye (2) turns on a different point. Bettini agreed to sing in concerts as well as in operas, and also not to sing anywhere out of the theatre in the United Kingdom of Great

(1) L. R., 2 Ex., 193.

(2) L. R., 1 Q. B. D., 183.

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Britain and Ireland, from the 1st January to the 31st December 1875, without the written permission of Mr. Gye, except at a distance of more than fifty miles from London and out of the season of the theatre, and also to come over before the season began for the purpose of rehearsals. Mr. Gye sought to rescind the engagement, because Bettini did not come to rehearse. It was held that the stipulation as to rehearsals was not a condition precedent. The case of *Fleming v. Koegler* (1) would be in point if the words after "seven days' notice from the shipper" had been used, instead of "after completion of two country voyages."

The conclusion I arrive at is, that the proper construction of the contract in this case is, that the purchaser had the option to fix the time during November when the seller should begin to give delivery, and the seller had no right to refuse beginning delivery on the 12th. The letter of the 5th was not answered till the 12th. On the 15th, three days after, the plaintiff gave notice that the contract was at an end: the defendants had declined by their letter of the 12th to give delivery, and the plaintiff was justified, on the 15th, in treating the contract as abandoned and sending in the bill. The first issue must be answered by stating that the defendants were bound to commence delivery on the 12th, and continue delivering with reasonable despatch. The second issue must be answered that the plaintiff was ready and willing to take delivery, and had done all things necessary to entitle him to delivery on the 12th. The letters of the 5th and 11th are sufficient to show this, and the plaintiff had provided funds for the payment. As to the third issue, what is the measure of damages? It is the difference between Rs. 5-11 and the ruling price on the 15th November. There is no evidence on the defendants' side. The plaintiff's evidence is not uniform.

One witness, a large dealer, brought his books and showed that 400 maunds were sold on the 15th at Rs. 7-13, and said that 1,000 would sell at Rs. 7-11. Mr. Stewart speaks to a sale on the 15th November to Messrs. Ernsthausen and Oesterley at Rs. 8-8; both are actual sales, and don't tally at all. The plaintiff claims

damages at Rs. 8-12. I think if I give him Rs. 7-12, he will get all he is entitled to. Damages will be for 1,000 bags at the difference between Rs. 5-11 and 7-12, or Rs. 2-1 per maund. Each bag contains 1 cwt., or 1 maund 14 seers and 10 chittaks.

From this decision the defendants appealed.

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Mr. *Evans* (Mr. *Bonnerjee* with him), for the appellants, contended, that the defendants had the whole of November in which to give delivery. Had the words "on seven days' notice from the buyer" been omitted, time would have been of the essence of the contract, and they would have been bound to deliver at or before the end of November; see s. 55 of the Contract Act. There the words are "at or before." In this contract there is no stipulation to do anything "at" any specific time, because "on," which is used here, means "after"—*Queen v. Arkwright* (1). The plaintiff was not entitled to delivery at any rate until after the 12th, according to the words of the notice he gave. The effect of the addition of those words was to make a condition precedent; and the defendants were not bound to deliver before they got notice to do so; the additional stipulation only enabled the plaintiff to fix a time before which he would not take delivery, and did not alter the whole contract as to time, nor take away the right the defendants had under the previous words to have the whole of November to give delivery—*Benjamin on Sale*, 559. To construe the contract as the plaintiff wishes would be to introduce a new term as to time into it. The plaintiff had no right to treat the contract as being at an end. He ought to have taken delivery, as we offered it, at the end of November, and then, if he was damaged, sued for breach of the contract. *Pollock on Contracts*, 2nd Ed., pp. 443—445, and *Coddington v. Paleologo* (2) were also referred to.

Mr. *Branson* and Mr. *T. A. Apcar* for the respondent were not called upon.

The judgment of the Court (GARTH, C. J., and PONTIFEX, J.) was delivered by

GARTH, C. J. (who, after shortly stating the facts and refer-

(1) 12 Q. B., 960.

(2) L. R., 2 Ex., 193.

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ring to the letters of the 5th, 11th, and 12th November, continued).—It is clear from these letters, that the construction which the plaintiff put upon the contract, and which has been adopted by the Court below, was, that although the whole of November was the period mentioned in the contract for giving and taking delivery of the goods, the particular time in November at which the delivery was to commence was to be determined by a seven days' notice, which was to be given by the buyer. The buyer had thus the option of fixing the time for delivery; and at the expiration of the seven days' notice, the sellers would be bound to commence to deliver, although, of course, they would be allowed a reasonable time after the expiration of the notice for completing the delivery.

The defendants, on the other hand, contended, that they had the whole month of November in which to deliver the ginger; and that although the seven days' notice might have been given by the plaintiff on the 1st of November, the defendants would still have until the last day of the month to complete the delivery.

I am of opinion, that the view which has been taken by the Court below is the correct one. No doubt if the words had been "delivery to be taken and given during the whole of November," the sellers would have had the whole month in which to deliver. But it seems to me that the words "on seven days' notice from the buyer" are intended to give the buyer the right of fixing the particular time in November at which the delivery was to take place. If this were not so, the words seem to me to have no meaning.

I think, therefore, that the defendants were bound to commence delivery on the 13th of November, and that the breach of contract occurred when the sellers virtually refused to deliver until the 28th of the month.

It has also been suggested by Mr. Evans that the seven days' notice which the plaintiff gave was insufficient, because it required the delivery to be made "within seven days" instead of at the expiration of seven days from the 5th November. But this is at best a mere formal objection; and I think it clear from the correspondence that the defendants understood and treated the

notice as a seven days' notice under the contract. If the notice had not been given, the sellers would not have been bound to deliver at all; but the defendants evidently considered themselves bound by the notice to deliver according to the true meaning of the contract. Moreover, this point as to the form of the notice was neither taken in the correspondence between the parties, nor in the written statement of the defendants, nor in the Court below, nor in the grounds of appeal to this Court.

The only other point which has been made by the appellants is, that the Judge, in estimating the damages, has given the plaintiff two annas a bag too much. This is a small point, and Mr. Branson does not contest it. The damages, therefore, will be reduced by two annas a bag. But as the appeal has substantially failed, it will be dismissed with costs on scale No. 2.

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Appeal dismissed.

Attorneys for the appellants : Messrs. *Ghose and Bose.*

Attorney for the respondent : Baboo *Kalinath Mitter.*

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

BIBEE SOLOMON (PLAINTIFF) v. ABDOL AZEEZ AND ANOTHER
(DEFENDANTS).

1881
Jan. 7, 10, &
11 & Feb. 7.

Compromise, Suit to set aside—Fraudulent Representations—Sanction by Court of Compromise entered into by a Minor—Misapprehension or Mistake as to material Facts—Contract Act (IX of 1872), s. 20—Inquiry as to whether it would be for benefit of Minor to set aside Compromise.

The plaintiff, a minor, was, as daughter and one of the heirs of *A*, entitled to 7-24ths of his estate. The value of *A*'s estate was uncertain, and depended on whether or not *A* had been a partner in business with *M*, and whether or not a sum of Rs. 30,000 had been paid by *M* to *A*, in satisfaction of all claims which *A* had against *M* in respect of the estate of *K*, a deceased brother of *A*, and a former partner in the same business. *M* having, on *A*'s death, possessed himself of all the estate of *A*, the plaintiff brought a suit against *M*, in which a decree was made, ordering an account to be taken of the estate of *A* which had come into the hands of *M*. Pending such account, *M* died, leaving a will, by which he appointed the son of *A* and

1881 * another his executors, and the suit was revived against them. In their application for probate they stated that the value of *M's* estate, so far as they had been able to ascertain and were aware, was Rs. 4,41,000. Shortly after probate was granted, negotiations were entered into between the executors and the advisers of the plaintiff for a compromise, and a petition was, with the concurrence of the executors, presented by the plaintiff to the Court, asking for its sanction to the terms agreed upon by the parties, which were, that the plaintiff should receive Rs. 20,000 in full of all demands, and Rs. 5,000 for her costs of suit. This petition took as the value of *M's* estate the amount stated by the executors in their application for probate, and stated that the value of *A's* estate, in case the abovementioned payment by *M* was proved, would be Rs. 30,000, and in case it was not proved, then a moiety of the estate of *M*; and that, considering the difficulties the plaintiff had to meet in proving her case, and with a view to put an end to further trouble, litigation, and expense, the above terms had been agreed to on her behalf. These terms of compromise were sanctioned by the Court on the 11th September 1876. Shortly afterwards, further property was discovered belonging to the estate of *M*. The plaintiff brought a suit against the executors to set aside the compromise, alleging that the terms had been accepted by her on the faith of the representation made by the executors in their application for probate, and charging them with wilful and fraudulent concealment. There was evidence to show that some of the property subsequently discovered was such that the defendants as executors ought to have known, even if they did not of its existence at the time of the compromise. *Held*, that even though the executors had no such knowledge, and there was no actual fraud, yet there was such culpable ignorance and neglect of duty on their part as to amount to fraud, and carry with it the consequences of knowledge, and as the compromise had in consequence been entered into by the parties and sanctioned by the Court under a misapprehension of material fact, the plaintiff was entitled to have the compromise set aside, and the parties restored to their rights in the former suit at the time it was effected.

Per PONTIFEX, J.—In cases where the sanction of the Court is required, as where there is an infant concerned, each party is bound to see that the materials on which the sanction of the Court is asked for are unimpeachable.

Per PONTIFEX, J.—*Quære*.—Whether in this suit, if the questions were found to arise, it would be necessary for the Court to consider whether it would be for the benefit of the minor that the compromise should be set aside?

Per GARTH, C.J.—*Semble*.—Even if it only appeared that the compromise had been entered into and sanctioned under an entire mistake of the parties and of the Court with regard to the subject-matter of the agreement, it ought to be set aside under s. 20 of the Contract Act.

Per GARTH, C.J.—In a substantive suit by a minor to set aside a compromise made with the sanction of the Court obtained by fraud or mistake, it is

not the province of the Court to inquire whether it would or would not be for the benefit of the minor that the compromise should be set aside; though it might be otherwise on an application for review to the Court which granted the sanction.

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APPEAL from a decision of WILSON, J., dated the 30th June 1880.

The plaintiff in this suit was a minor, and sued by Syad Ahmed, her next friend, to set aside a compromise made between herself (her mother Bibee Rubbia acting on her behalf) and the defendants Abdool Azeer and Ahmedoolah, the latter of whom died pending the appeal. The compromise was alleged to have been made on the faith of representations made by the defendants to the plaintiff, which afterwards turned out to be untrue.

The material facts are fully set out in the judgment of PONTIFEX, J.

WILSON, J., dismissed the suit, finding on the evidence that the compromise had not been agreed to on the faith of the representations as alleged, such representations never having been made.

The plaintiff appealed from this decision.

Mr. Phillips and Mr. T. A. Apear for the appellant.

Mr. Kennedy and Mr. Bonnerjee for the respondents.

The following cases were referred to in argument:—*Hull v. Turner* (1), *Brooke v. Lord Mostyn* (2), *Rawlins v. Wickham* (3), *Gilbert v. Endean* (4), *Baboo Lekraj Roy v. Baboo Mahtab Chand* (5), *Trigge v. Lavalée* (6), *Flower v. Lloyd* (7). Section 20 of the Contract Act was also referred to.

(1) L. R., 14 Ch. D., 829.

(4) L. R., 9 Ch. D., 259.

(2) 2 DeGex J. & S., 373; S. C.,
33 Beavan, 457.

(5) 14 Moo. P. C., 393; S. C., 10
B. L. R., 35.

(3) 3 DeGex & J., 304.

(6) 15 Moo. P. C., 270.

(7) L. R., 10 Ch. D., 327.

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The following judgments were delivered :—

PONTIFEX, J.—The plaintiff is a minor, and sues by her next friend to set aside a compromise sanctioned by this Court in a former suit.

In that suit her title was stated in the following way :—

One Sudickjee, of Cashmere, carried on large business operations in Calcutta, other parts of British India, and Cashmere. He died, nearly fifty years ago, intestate. His business was carried on in partnership with Khajah Mussijee and Koodoor Mullick. He left two sons, Khaluckjee and Ackbarjee, and a daughter, Fatima, who was the wife of his partner Khajah Mussijee.

That, after Sudickjee's death, his son Ackbarjee had charge of the Calcutta business.

That Khajah Mussijee died in 1854, having bequeathed the residue of his estate to his son Khajah Moheeoodeen and Khaluckjee. That Khaluckjee died in 1859 intestate, leaving Ackbarjee one of his heirs.

That Ackbarjee died in 1868, having been jointly interested in the business with Khaluckjee and Khajah Mussijee up to the death of the latter ; and from his death, with Khaluckjee and Moheeoodeen until the death of Khaluckjee ; and after his death with Moheeoodeen until his own death in 1868.

That Ackbarjee left, among other heirs, a son, the defendant Abdool Azeer, and a daughter, the infant plaintiff, her share as an heir being 7-24ths of the estate left by Ackbarjee. That it was alleged that Ackbarjee left a will, by which, after giving certain legacies, he bequeathed a sum of Rs. 30,000 in trust for his son Abdool Azeer. That such will contained a recital that Moheeoodeen had given the testator the said sum of Rs. 30,000 in full satisfaction and discharge of all claims which he might have against the estate of his deceased brother Khaluckjee.

But the infant plaintiff denied that she had ever given any consent to the will of Ackbarjee, which would, therefore, be inoperative against her.

This suit of the infant plaintiff was instituted on the 21st December 1871 against the executors of the will of Ackbarjee

and against Moheecoodeen, alleging that the latter had possessed himself of the whole of Ackbarjee's estate.

Now if these allegations were true, Ackbarjee would have been a partner in the aforesaid business and interested in the property thereof, partly on his own account and partly as being one of the heirs of his brother Khaluckjee.

The infant plaintiff's suit was tried by Mr. Justice Phear. He had dismissed the executors named in Ackbarjee's will from the suit, as they had never taken out probate, or in any way intermeddled with the estate.

The only question considered by Mr. Justice Phear was, whether Moheecoodeen was accountable to the plaintiff for assets of Ackbarjee come to his hands. In his judgment he said: "Moheecoodeen is, without doubt, the principal defendant in this suit; and although Abdool Azeez, now somewhat feebly advances a personal responsibility for the Rs. 30,000, I should be shutting my eyes to all the *indicia* afforded by the conduct of the parties to the suit if I did not perceive that Moheecoodeen is the person really concerned in the fate of this trial. I have no sort of doubt that, on the death of Ackbarjee, all his estate and effects came into the hands of Moheecoodeen, and so far as they have been administered at all, have been administered by him. He must, therefore, account in this suit. And regard being had to the share he had in putting the will into its existing shape, I think the release contained in the last clause must not be used as evidence in his favour in the accounts." It is observable that Mr. Justice Phear expressed no opinion as to whether Ackbarjee had been a partner in the business as alleged by the plaintiff, or as to what his estate consisted of. That of course was a matter reserved for further consideration in a later stage of the cause when the inquiries and accounts directed by the decree had been made and taken.

By Mr. Justice Phear's decree it was declared that Ackbarjee's will was inoperative against the infant plaintiff; and the following accounts and inquiries were ordered to be taken and made:—

1. An account of the estate of Ackbarjee come to the hands of Moheecoodeen.

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3. An inquiry as to what part (if any) of Ackbarjee's estate is outstanding and undisposed of.

And further consideration was reserved with liberty to apply.

Under the account numbered 1 and the inquiry numbered 3, it was competent to the infant plaintiff to prove that Ackbarjee was a partner in the business, and that part of his estate was represented by part of the capital and profits thereof.

The judgment and decree of Mr. Justice Phear were confirmed by the Appeal Court on the 28th March 1876, with this modification,—That it was ordered that, in taking the said accounts, no regard was to be had to the statement in the last clause of Ackbarjee's will except as *corroborative evidence*, and until after other substantive proof had been given of the said alleged release and the payment of the sum of Rs. 30,000 therein mentioned.

The suit was, accordingly, remitted to the lower Court for the purpose of proceeding with the accounts and inquiries.

But before any progress could be made with the said accounts and inquiries, Khajah Moheeoodeen died on the 12th of April 1876, leaving a will, whereby he appointed Abdool Azeer and Ahmedoolah, who are defendants in the present suit, his executors. Ahmedoolah has since died.

It is to be observed that the last clause in Ackbarjee's will, even if established to be true by other substantive proof, applies only to his claim in respect of his brother Khaluckjee's estate; and in no way relates to his claim as a partner in the business if such claim can be substantiated. But the amount of this latter claim, if substantiated, might depend to a very great extent on the true value of the estate of his alleged partner Moheeoodeen, who, as surviving partner, would have succeeded to the entire business. The value and nature of his estate might furnish some index of the value of the business.

On Moheeoodeen's death the original suit was revived as against his executors.

On the 1st of May 1876, Moheeoodeen's executors applied for and obtained probate of his will.

In their application for probate they stated that Moheeoodeen

left property in British India, the approximate value of which was Rs. 4,41,124 as shown by an annexed schedule.

That schedule is set out in the 5th paragraph of the plaint in the present suit. Its particulars consist of houses in Calcutta, debts due to the deceased in Bombay, debts due to the deceased in Bengal, debts due to the deceased from his own Cotee in Umritsur, and certain personal articles.

According to common form the executors stated that *so far as they had been able* to ascertain and were aware, there was no other property belonging to Moheeoodeen in British India besides the items specified in the schedule.

It is to be observed that the schedule says nothing whatever about Government paper, or stocks, or shares, or balance at the deceased's bankers. Yet Doorga Churn Law, the banker, who has been examined, says—"At the time of Moheeoodeen's death, the balance of the account was against us. It was a pretty large balance."

Shortly after probate was granted some negotiation must have been entered into for a compromise of the infant plaintiff's claim. For, ultimately it was agreed between the adviser of the infant plaintiff and the executors of Moheeoodeen, that the infant plaintiff should accept Rs. 20,000 in full of all demands, together with Rs. 5,000 for her costs of suit; and that the approval of the Court should be obtained on behalf of the infant.

It was of course equally important for both parties that the Court's approval should be obtained; and in my opinion it was the duty of both parties to take care that the Court should have correct materials on which to form its judgment.

According to the arrangement, the infant, by her next friend, presented a petition to the Court, asking for its approval to the compromise, such petition having been previously submitted for consideration to the executors.

The petition, after stating generally the plaint and decree in the original suit, and the result of the appeal therefrom, and the death and will of Moheeoodeen, proceeded in its 7th, 14th, and 15th paragraphs as follows:—

"7th.—That, in the petition filed by the said executors of the said defendant Khajah Moheeoodeen, and in which they applied

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for probate as aforesaid, they declared that the estate and effects of the said defendant Khajah Moheeoodeen left by him at the time of his death consisted " [of certain specified property, the estimated value of which was Rs. 4,41,124,] as on reference to the said petition, which is now filed of record, will more fully appear.

"14th.—That the estate of the said Ackbarjee, deceased, in case the alleged payment is proved, will amount to Rs. 30,000, subject to certain legacies in his said will mentioned; but in case such payment is not proved, *the same will be a moiety of the estate and effects of the said defendant Khajah Moheeoodeen, deceased.*

"15th.—That, under the circumstances of the case, and considering the length of time, trouble, and expense which have already been involved in this, and which may hereafter be entailed in bringing it to a close, and considering other difficulties which the plaintiff has to meet in the matter, and with the view to put an end to further litigation, trouble, and expense, and to save the estate from being swallowed up by costs, I, as mother and guardian of the infant plaintiff and her said stepfather as her manager and agent, have, under the advice of Counsel, agreed with the defendants to certain terms of settlement in respect of all claims and demands of the infant plaintiff, which terms are hereto annexed and marked A."

The proposed terms of settlement were the following :—

1. "That the defendants do bring into Court Government promissory notes of the $4\frac{1}{2}$ per cent. loan for Rs. 20,000, in full of all the plaintiff's (Bibee Solomon's) claims and demands in respect of the matters in suit, and in full of all her claims and demands whatsoever against the estate of the late Ackbarjee or against the executors of his will, or against Moheeoodeen or his heirs and representatives, or his or their estate and effects.

2. "That the said Company's paper be placed to the separate credit of the said Bibee Solomon in this suit, and the interest thereof paid out for her benefit during her minority to her mother and guardian Bibee Rubbia.

3. "That the defendants do pay all the costs of this suit and of all proceedings relative to the will of Khajah Moheeoodeen on

scale No. 2 as between attorney and client, such payment to be made (as to plaintiff's costs) through the plaintiff's attorneys Messrs. Orr and Harriss.

4. "That the defendants do pay to the defendant Doorga Churn Law and others costs directed to be paid by the plaintiff to them, so that the said Company's paper for Rs. 20,000 may without deduction be placed to her credit herein as aforesaid.

5. "That the books of account, which were brought in and now are in Court in this suit, be forthwith delivered out to the defendants."

This petition, as it happened, was heard by me then sitting on the Original Side of the Court; and according to my note both parties appeared at the hearing. I think I may trust my memory so far as to say that I refused to make any order on the petition until the statements contained in it were verified by affidavit, which, when the petition was presented, had not been done. Subsequently, the petition having been verified by affidavit, it was my duty to consider whether or not the Court ought to approve the arrangement. I find from my note-book the petition was before me on the 4th and 11th of September 1876.

Now, it would be exceedingly dangerous for me to charge my memory with the reasons which led me to grant the approval of the Court to this compromise. But looking at the petition and the order made upon it as if it had been made by some one other than myself, it is clear that the Court had before it only certain data on which to found its order. Those data are contained in the 14th paragraph read with the 7th, and in the 15th paragraph.

According to the 14th paragraph, the infant plaintiff was entitled to either one of two sums, taking the outside value of each; that is to say, not allowing for any other claims against the funds—namely, either to 7-24ths of Rs. 30,000 or Rs. 8,750, or to 7-24ths of a moiety of Rs. 4,41,124, or somewhere about Rs. 64,000.

The claim in the 14th paragraph to a moiety of the estate of Moheeoodeen must of course have been in respect of the alleged partnership.

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Then there was the further datum, namely, the allegations contained in the 15th paragraph of the petition.

Now, the sum offered by way of compromise was Rs. 20,000 of $4\frac{1}{2}$ per cent. Government paper, down, and all costs, which exceeded Rs. 5,000.

It was upon those data, and those data only, that the Court approved the compromise by an order dated 10th September 1876.

It appears by proceedings in the present suit that Moheeoodeen's executors paid Rs. 5,000 in respect of costs alone under the order.

The compromise having been confirmed, the executors of Moheeoodeen suddenly discovered, before the Rs. 20,000 and the costs were paid, that property, at all events of the value of three lacs, or, as estimated by the plaintiff in this suit, of the value of nine lacs, was belonging to the estate of Moheeoodeen, though not mentioned in the schedule to the application for probate, or in the petition for the Court's approval.

The order confirming the compromise having been made on the 11th of September, Mr. Paliologus, the defendants' solicitor, writes on the 20th of September as follows:—

“The Company's papers for Rs. 20,000, and 5,000 towards your costs, are with me; and if you have a copy of the decree, will you please lodge it, or let me have it, that I may do so with the Company's papers.

“I have this day learnt that two lacs more of Company's papers belonging to the estate of Moheeoodeen have been found, and I have received instructions to apply that further duty from the estate be received upon this sum.

“This, however, I think you will agree with me in no way affects the settlement in this case.”

The letter does not say, and there is no evidence to show, when the defendants first learned of this addition to their testator's estate. And the last paragraph of the letter to my mind is rather suggestive of doubt in the mind of the writer whether the discovery did not affect the compromise.

But however that may be, the writer of the letter seems to have forgotten that his clients were dealing with a minor; and that it might be right to bring this discovery to the notice of

the Court before payment of the Rs. 20,000 was made. Before this letter (which was written at the commencement of the vacation) was answered, the Rs. 20,000 was transferred to an account in the infant's name, and Rs. 5,000 was paid for costs. But on the 29th of January 1877, the plaintiff's attorney wrote as follows:—

“ With reference to your letter to us of the 20th September last, we are instructed by our client's guardian to say that the sum of Rs. 20,000, which she accepted for settlement of the infant plaintiff's claim, was so done on the statement of the assets contained in the petition of the executors filed on the 1st May 1876; but as since the settlement was made so large a sum as Rs. 2,00,000 more has been discovered, she thinks that the plaintiff is fully entitled to a proportionate sum in addition to the sum of Rs. 20,000 paid as aforesaid; and is, therefore, desirous of bringing this matter to the notice of the Court.

“ The desire is, we consider, reasonable, and we have no doubt you will agree with us as to the propriety of having the matter mentioned to the Court with the view to further directions.”

On the 29th of January and 24th of February, Mr. Paliogus wrote the following letters:—

“ *January 29th.*

“ It is strange that such a time has been allowed to go by without anything being done, and now that the executors are in Cashmere, it is proposed to reopen the question. I can at present only refer a copy of your letter for instructions.”

“ *February 24th.*

“ I forwarded a copy of your letter of yesterday's date to the manager of the Cotee here, and he instructs me to say that he has no power to consent to open this matter which was considered settled by the executors before they left Calcutta. Your first letter has been forwarded to them, and the manager expects a reply in two or three days. A copy of your last letter will also be sent up by this day's date.”

The foregoing are the circumstances under which the present suit was instituted on behalf of the infant plaintiff on the 20th of March 1879.

Her plaint states the proceedings in the former suit, the de-

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fendants' petition for probate, and the schedule annexed thereto, and the petition and order for compromise.

In the 6th paragraph the plaintiff alleges that the *executors* of Moheeoodeen conducted the negotiation; and represented the estate of Moheeoodeen to consist only of the property mentioned in the application for probate of his will, with the sole exception of a house in Cashmere, and that the terms of settlement were accepted on the faith of such representation. The plaint then refers to the letters of the 20th September 1876 and the 29th of January 1877; and in the 12th paragraph states that, in addition to the Company's papers for two lacs of rupees, other property has been discovered as belonging to Moheeoodeen, consisting of railway, bank, and other shares, houses and other property of the estimated value of many lacs of rupees.

The 16th paragraph charges wilful and fraudulent concealment, but submits that even if the estate had been underestimated by mistake, the settlement should be reopened; and the 1st, 2nd, and 6th paragraphs of the prayer are as follows:—

1. "That the said agreement for settlement and the said decree may be declared not binding upon the plaintiff, and may be set aside or cancelled.

2. "That the accounts ordered to be taken by the said decree of the 28th March 1876 may be proceeded with.

3. "That so far as may be necessary, this suit may be considered supplemental to the said suit of the plaintiff and the said Bibee Rubbia."

The defendant Abdool Azeer alone put in a written statement, the other defendant Ahmedoollah having died after the institution of the suit.

The plaintiff having charged that the executors had made certain representations, Abdool Azeer in his written statement denies that allegation, but we have no denial by Ahmedoollah. It is true that, according to the plaintiff's evidence, Abdool Azeer himself joined in the representations—nay was the principal party in making them. This of course he was in a position to deny; but in his evidence he admits that "Ahmedoollah took some part in the settlement," but he does not know

what part." Obviously, therefore, he was not in a position to deny the plaintiff's allegation so far as it related to Ahmed-collah.

In the 7th paragraph of his written statement Abdool Azeez

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"This defendant says that from the best enquiries that he and his said co-executor have been able to make, they have found, and he charges that it is true, that the said Ackbarjee had received Rs. 30,000 from the said Khajah Moheecooddeen in full satisfaction of all the claims of the said Ackbarjee against the said Moheecooddeen in respect of the estate of the said Mussijee in the will of the said Ackbarjee mentioned."

Now, as a matter of fact, we are told that the only evidence adduced by the defendants to the plaintiff's advisers in the former suit with respect to the alleged payment of this Rs. 30,000 were certain entries in Moheecooddeen's books; and that these entries refer to three Government papers of Rs. 10,000 each, which have been identified with three papers which Doorga Churn Law, the banker of Moheecooddeen, states in his evidence in this suit, that he held for Moheecooddeen and transferred to Rohim Shaw, the gomashtha of Moheecooddeen, in December 1875 and May 1876, long after the death of Ackbarjee. No doubt this may be capable of explanation, for the papers may have got back into Moheecooddeen's hands as part of the estate of Ackbarjee after his death. But a strong case of suspicion seems to me to have been raised with respect to the truth of the 7th paragraph of the written statement of Abdool Azeez, particularly as Moheecooddeen in the former suit does not attempt to rely on the suggested explanation, and as, according to the plaintiff's evidence in this suit, these papers were never in the name of Ackbarjee. And if once the story as to the payment of the Rs. 30,000 is proved to be a fabrication, the entire case and conduct of Moheecooddeen are open to the gravest suspicion.

The learned Judge settled six issues in this suit:—

1. "Did the original defendants, the executors, make the representation to Bibee Rubbia alleged in the 6th paragraph of the plaint?"

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2. "Did Bibee Rubbia agree to the terms of compromise on the faith of such representation?"

3. "Was such representation false?"

4. "Was it fraudulent?"

5. "Was the Court misled when the compromise was sanctioned; and if so, was the matter in regard to which it was misled material?"

6. "To what relief is the plaintiff entitled, and on what terms?"

Of these it was agreed that only the 1st and 2nd should be tried in the first instance. This course was taken probably to save expense to the parties, as for the trial of the other issues it might be necessary to bring down witnesses from Cashmere. But I cannot help thinking that it was unfortunate that this course should have been pursued, because, in a case of this kind, it is especially useful to investigate the entire case of each party.

In the trial of the two issues, the plaintiff's mother and step-father were respectively examined, and stated that, after Moheeoodeen's death, first Abdool Azeer came and proposed a compromise, afterwards Soonaoollah, sometimes with Abdool Azeer and sometimes alone as his agent, and sometimes Abdool Azeer, Ahmedoollah, and Soonaoollah, and that all three were present at the final settlement. They certainly state that Abdool Azeer was the principal negotiator.

Abdool Azeer, on the other hand, in his deposition, denies that he had anything whatever to do with the negotiation. And although he was the principal party interested, he makes what seems to me to be the following incredible statement:—"I was not aware that the settlement was going on. I never came to know of the negotiations going on, or of the settlement. I did not know of the negotiations *until the matter of the payment arose.*"

But he says:—"Soonaoollah was managing the negotiations;" and that "Soonaoollah and Rohim Shaw were acting jointly on his behalf in the matter of the settlement." Neither Soonaoollah nor Rohim Shaw has been called as a witness.

In this state of circumstances the learned Judge has believed Abdool Azeer, and disbelieved the plaintiff's mother and step-father.

But if the extent of Moheeoodeen's estate was not a factor, and an important factor in the negotiation, it is difficult to understand why such prominence should have been given to it in the petition for the Court's approval.

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There must have been some negotiation, and indeed this is admitted by Abdool Azeez to have occurred with Ahmedoollah, Soonaoollah, and Rohim Shaw. And the fact that the plaintiff obtained with costs over Rs. 25,000, a sum greatly larger than her 7-24ths of the Rs. 30,000, would seem to indicate that some other important items had been taken into consideration. It moreover seems difficult not to conclude from the evidence that a house in Cashmere was mentioned; and if it was mentioned, in what other possible connection than the extent of Moheeoodeen's estate?

In trying the first two issues, a question was asked by the defendants' counsel of Abdool Azeez as to when he first knew of the addition to Moheeoodeen's estate. This question was objected to by the plaintiff's counsel, and the objection was allowed, probably on the ground that the question did not bear on the first two issues. This is an ill result of trying the two first issues by themselves; for, as the evidence now stands, we do not know whether the defendants were aware of the addition before the compromise, and concealed it.

The learned Judge in fact only tried the two first issues, and he seems to have decided that if any representation was in fact made, it was not material, and was not an inducing cause of the compromise with the plaintiff's advisers.

Speaking, not as the Judge who approved the compromise, but as a stranger to that proceeding, I feel bound to say that I think the 5th issue should have been considered; and having regard to the petition upon which the order for compromise was founded, I should myself consider that the Court was misled in a particular, which, according to the 14th paragraph of the petition, was material, and the verified petition was the only matter before the Court on which an opinion could be founded.

Now let us see what were the circumstances under which the executors of Moheeoodeen allowed that petition to go before the Court.

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It must have been well known that Doorga Churn Law was the banker of Moheeoodeen.

Abdool Azeer says that he had heard from Rohim Shaw, the gomashita of Moheeoodeen, the particulars of his estate. Doorga Churn Law says, that, in December 1875 and the 12th of March 1876, he had transferred to Rohim Shaw the Company's paper for Rs. 30,000; and that, at Moheeoodeen's death, which occurred on the 12th April 1876, he had in deposit with him for safe custody the following securities belonging to Moheeoodeen's estate:—200 National Bank shares, worth Rs. 20,000; 10 Bombay Bank shares, worth Rs. 6,000; 20 Paris Municipal Debentures, worth Rs. 2,000; and 25 East Indian Railway shares, worth Rs. 7,500. And he also says: "At the time of Moheeoodeen's death the balance of the account was against us. It was a pretty large balance." At the time of the compromise Rohim Shaw was in Calcutta, and acted in it as the defendants' agent, as Abdool Azeer admits.

Is it conceivable that Rohim Shaw, the gomastah, had made no inquiry of Doorga Churn Law, or was ignorant of the existence of the Company's papers for two lacs or some part of it?

The defendant now admits the existence of these two lacs; but we do not even know how, where, or when they were discovered.

Even if the executors were really ignorant of this large addition to the estate at the time of the compromise, though the discovery was made suspiciously soon, ten days afterwards, was it not such culpable and wilfully blind ignorance, at all events as to the securities on deposit with Doorga Churn, as to be equivalent to or carry with it the consequences of knowledge. In the case of *Bell v. Gardiner* (1), C. J. Tindal says:—"We can in fact regard the possession of the means of knowledge only as affording a strong observation to the jury to induce them to believe that the party had actual knowledge of the circumstances." And again: "There may be cases where the existence of the means of knowledge might lead irresistibly to the inference that the party had actual knowledge:" and Mr.

Justice Cresswell added, "Where a party has the means of knowledge it may be evidence of actual knowledge." Exercising the functions of a jury, I think it would be difficult not to arrive at the conclusion that the executors of Moheeoodeen had actual knowledge of the securities with Doorga Churn Law. But with respect to the two lacs of Company's paper, I have no materials to form an opinion beyond the suspiciously sudden discovery immediately after the sanction of the compromise.

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Now a transaction very similar to this was discussed by the Lords Justices in the case of *Brooke v. Lord Mostyn* (1). In that case a compromise had been approved by the Court on behalf of an infant. For the purposes of the compromise it was necessary to ascertain the value of an estate. A document relative to the valuation of the estate, and which the Lords Justices considered material, was in the possession of the party to be charged, and was not produced. On that ground the Lords Justices set aside the compromise. On appeal to the House of Lords, that decision was reversed only on a question of fact and not of law.

Lord Justice Turner, at p. 416, considers what circumstances will furnish sufficient ground for impeaching a compromise made under the order of the Court. He says with respect to a compromise between adults: "If there be no fraud, and equal knowledge on both sides, the compromise cannot be disturbed; but if there is knowledge on one side, which is withheld, the compromise cannot stand, because the withholding of the knowledge amounts, in the view of a Court of Equity, to fraud." And he proceeds to say, that the rule is the same when a compromise is sanctioned by the Court on behalf of an infant.

I confess I am myself inclined to think that even a higher degree of good faith is due when the Court's sanction is required, because that sanction is equally necessary for both parties; and each party is in my opinion bound to see that the materials before the Court are unimpeachable. The Lord Justice proceeds, p. 423:—"It may be said, perhaps, that the master was satisfied with the information laid before him and called for no

(1) 2 DeG. J. and S., 373.

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further information ; but the question is not whether the master called for further information, but whether *the parties* having this further information in their possession were justified in withholding it."

I am of opinion that if the plaintiff's allegations as to the partnership are true—which question has not yet been tried—the extent of Moheeoodeen's estate may be material, and that at all events the petition for compromise led the Court to believe so. The compromise was confirmed under that impression ; and the representation as to the extent of Moheeoodeen's estate in the petition was due either to the fraud (which issue has not been tried), or the culpable and wilful ignorance of the executors in a matter which it was their duty to have thoroughly inquired into, and as to which, at least so far as respects the property in Doorga Churn Law's custody, they had an easy and natural means of knowledge.

I am of opinion, therefore, that the judgment appealed against should be reversed, and the case remitted to the lower Court for the trial of all the issues.

Of course, if the compromise is set aside, the parties must be replaced in their former positions, and the Rs. 20,000 re-transferred. But it may not be necessary to deal with the Rs. 5,000 paid for costs, as the plaintiff's admitted rights in the Rs. 30,000 would exceed that sum.

It may, however, be questionable whether there may not be a difficulty in trying this case as long as the plaintiff's minority continues, as it may be argued that it may be necessary for the Court to consider whether it will be for the benefit of the plaintiff to set this compromise aside ; and in the consideration of that question, the truth of the plaintiff's allegations in the original suit might have to be investigated.

However it will be for the lower Court to consider whether that question arises. All that we decide now is, that the case must be remitted to the lower Court to try all the issues with respect to the compromise. The costs, both of this appeal and of the original hearing, will abide the result.

GARTH, C. J.—I quite agree that this case has been imperfectly tried in the Court below ; and it seems to me that the

question of misrepresentation by the executors has been dealt with both by the Court and by the parties on too narrow a footing.

The question to be tried, as stated by the learned Judge at the commencement of his judgment, was this, "whether the story told by Bibee Rubbia and Mahomed Gouse as to the interviews and oral communications during the negotiations for a settlement are to be accepted as true."

Now it seems to me, that without going minutely into the nature of the representations made by the executors, or of the negotiations which resulted in the compromise, the following broad facts are abundantly clear:—

1st.—That, from the very nature of the arrangement, the actual value of the estate and effects of Moheeoodeen was a most important matter both for the parties and for the Court to ascertain, in order to determine whether the proposed compromise was one which, in the interest of the minor, ought to have been sanctioned;

2nd.—That the basis of the compromise in this respect was the statement made by the executors in their petition for probate, confirmed by their subsequent declaration. In the petition to the Court to sanction the compromise, that statement was brought prominently forward as the basis of the proposed arrangement;

3rd.—That not only Bibee Rubbia, but the Court, acted upon the assumption that this statement of the value of Moheeoodeen's property was substantially correct; and

4th.—That the executors might and ought to have known, and had certainly the means of knowing, if they had made proper and reasonable enquiry, that this statement was not true, and that Moheeoodeen's property was of much larger value than they had represented.

I think, therefore, that the compromise was entered into by the parties, and sanctioned by the Court, under a serious misapprehension of material facts; and that this misapprehension was caused either by the actual fraud of, or at any rate by a culpable neglect of duty, of the executors, sufficient, as I consider, to amount to fraud in the view of a Court of Equity.

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As at present advised, therefore, unless something further should be proved in the Court below, of which I am not aware, I think that the compromise ought to be set aside, and the parties restored to their position and rights in the former suit at the time when it was effected.

I confess, if it were necessary to decide the further question, I should be disposed to set aside the compromise, even though no fraud of any kind had been established; and it only appeared that the arrangement had been brought about *by an entire mistake of both parties and of the Court* with regard to the subject-matter of the agreement.

Thus, for example, suppose that, in an administration suit an agreement under the sanction of the Court were made with legatees, some of whom were minors, that they should accept a proportionate part of their legacies in satisfaction of the whole upon the supposition by all parties, and by the Court, that the estate to be administered was not sufficient to pay the legacies in full, and it turned out afterwards that the estate was much larger than was supposed, and that there were ample funds to pay all the legacies in full, it seems to me, as at present advised, that the compromise ought to be set aside, under such circumstances, on the ground of mutual mistake.

I rather think that s. 20 of the Contract Act is intended to meet a case of that kind; and therefore, if this case rested upon nothing more than the mistake of both sides and of the Judge who gave the sanction, I think that the compromise should be set aside.

There can be no difficulty here, as there might be in some cases, in putting both parties in *statu quo*; because all that has been done is the mere payment of Rs. 25,000, which can be readily repaid or adjusted.

And it seems to me, that this view is by no means opposed to the law as laid down by Lord Justice Turner in the case of *Brooke v. Lord Mostyn* (1), because he was then dealing with a very different state of things, and the question of mutual mistake was not present to the mind of the Court.

I should add with regard to the last observation made by my

brother Pontifex, that I rather doubt much whether, in a substantive suit brought by a minor to set aside a compromise obtained by fraud or mistake, it is the province of the Court to enquire whether it would or would not be beneficial for the minor that the compromise should be set aside. I rather think that this is a question for the advisers of the minor only; and that the minor has a right, at his option, to the relief prayed, if it is proved that there are proper grounds for it.

It might be a different matter, if an application were made to the learned Judge in the former suit who sanctioned the compromise to set it aside on a motion for review. He might then have to consider, perhaps, whether it was proper in the minor's interest to interfere. But here is a substantive suit to set aside a compromise on the ground of equitable fraud; and if the minor *has a right* to the relief prayed, I doubt whether the Court has any power to consider whether it would be beneficial to him to grant the relief.

This, however, will be a question for the Court below to consider when the case comes again before it.

Appeal allowed and case remanded.

Attorney for the appellant: Mr. Pittar.

Attorneys for the respondents: Messrs. Harriss & Co.

APPELLATE CIVIL.

Before Mr. Justice Morris and Mr. Justice Tottenham.

IN THE MATTER OF THE PETITION OF ISHAN CHUNDER ROY.*

1881
Jan. 28.

Application for Probate—Limitation Act (XV of 1877), sched ii, art. 178.

The Limitation Act is not applicable to an application for probate; such an application, therefore, is not barred by art. 178 of sched. ii of that Act.

THE facts material to this report sufficiently appear in the judgment.

* Appeal from Original Order, No. 76 of 1880, against the order of W. F. Meres, Esq., District Judge of Tippera, dated the 31st March 1880.

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Baboo *Troyluchyanath Mitter* and Baboo *Grish Chunder*

IN THE MAT-
TER OF THE
PETITION OF
ISHAN
CHUNDER
ROY.

Chowdhry for the appellant.

The judgment of the Court (MORRIS and TOTTENHAM, JJ.)
was delivered by

TOTTENHAM, J.—This is an appeal from an order of the District Judge of Tippera, rejecting, on the ground that it was barred by limitation, an application for probate of the will of one Obhoy Chunder Roy, who died on the 23rd of Pous 1281 (corresponding with the 6th January 1875).

The application was made on the 11th March 1880,—that is, five years and two months after the death of the testator. The Judge appears to have called for an explanation of the delay, and to have considered that no sufficient reason was made out. He rejected the application as being barred under art. 178, sched. ii of the Limitation Act.

We think that the lower Court was mistaken in applying the Limitation Act to a petition for probate. If the article quoted be read alone, it does indeed seem capable of the widest extension to every possible application that can be made to the Court, “for which no period of limitation is provided elsewhere in this schedule, or by the Code of Civil Procedure, s. 230.”

But the preamble to the Act distinctly shows that it is not intended to apply to all, but to *certain*, applications to Courts: and an examination of the 3rd division of sched. ii, which deals with applications, shows, that every article therein contained, No. 178 only excepted, specifically relates to some case pending or already decided. Article 178 must be construed with reference to the wording of the other articles, and can relate only to applications *ejusdem generis*, and therefore not to such an application as the one now before us. We find this principle has already been enunciated in this Court on the Original Side in the case of *Govind Chunder Goswami v. Rungunmoney* (1). It is to be observed, that in the previous Limitation Acts, XIV of 1859 and IX of 1871, no such article as this article (No. 178) was included, and under those Acts no question of limitation could have arisen in respect of an application for probate. It

(1) *Ante*, p. 60.

may fairly be presumed that, had the Legislature intended to apply for the first time a period of limitation to such applications, there would have been some provision in regard to them similar to that contained in s. 2 in respect of suits for which the new Act prescribes a shorter period of limitation than was previously allowed.

Altogether we are of opinion that no law of limitation governs applications for probate. Of course long unexplained delay may, in certain cases, throw doubt on the genuineness of the will propounded; but that is a different thing from saying that probate is barred by limitation. The appellant is entitled to have his application decided on its merits.

The lower Court's order is, therefore, set aside; and the case will be returned to it to be dealt with according to law.

Appeal allowed.

Before Mr. Justice Morris and Mr. Justice Tottenham.

KANGALI CHURN SHIA AND ANOTHER (DEFENDANTS) v. ZOMUR-
RUDONNISSA KHATOON (PLAINTIFF).*

1881
Jan. 28.

*Limitation—Possession, Suit for—Limitation Act (XV of 1877), sched. ii,
art. 47.*

In a dispute between *A* and *B* concerning the possession of a certain taluq, the Criminal Court made an order under s. 530 of the Code of Criminal Procedure retaining *B* in possession; and this order was, in a proceeding under ss. 295, 296 of the Code of Criminal Procedure, confirmed by the Court of Session. *Held*, that a suit by *A* for the recovery of the land must be brought within three years from the date of the Magistrate's order, and not from the date of the order passed by the Court of Session.

Article 47 of sched. ii, Act XV of 1877, refers to immoveable as well as moveable property.

Ahilundammal v. Periasami Pillai (1) approved.

In this case the plaintiff sued for possession of a certain taluq, which she had purchased, in 1871, at an auction-sale in

* Appeal from Order, No. 218 of 1880, against the order of Baboo Jeebunkishto Chatterjee, Subordinate Judge of Pubna, dated the 15th June 1880, reversing the order of Baboo Juggobundhoo Gangoolee, Munsif of Bogra, dated the 18th December 1879.

(1) *I. L. R.*, 1 *Mad.*, 309.

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execution of a decree. The defendants, who claimed to be in possession of the property as owners, had, in 1875, instituted proceedings respecting it against the plaintiff in the Criminal Court at Bogra, under s. 530 of the Code of Criminal Procedure; and on the 30th of June 1875, the Magistrate passed an order directing that the defendants should be retained in possession. The plaintiff, under ss. 295 and 296 of the Code of Criminal Procedure, then applied to the Judge of Rungpore for a reversal of the Magistrate's order, but the Judge confirmed the order on the 5th of April 1876. The present suit was instituted on the 1st of March 1879, and the only question was, whether the suit was barred by limitation. The Court of first instance held that the claim was governed by art. 47 of sched. ii of Act XV of 1877; that the final order spoken of in that clause was the order of the 30th of June 1875, and not the order of the 5th of April 1876; and dismissed the suit as barred by limitation. On appeal, the Subordinate Judge held, that the three years' limitation did not apply, because the suit was for the recovery of land by establishment of the plaintiff's title, and because no evidence was given to show that the land, which was the subject of the Magistrate's order, had comprised the whole of the land claimed in the present suit; and he cited the case of *Undhoob Narain v. Chutturdharee Singh* (1).

The defendants appealed.

Baboo *Shosheebhoosun Dutt* for the appellants.

Baboo *Sreenauth Doss* and Baboo *Jogesh Chunder Roy* for the respondent.

The judgment of the Court (MORRIS and TOTTENHAM, JJ.) was delivered by

MORRIS, J.—We think that the Subordinate Judge is wrong, and the first Court is right in holding that, so far as this suit is brought to recover property comprised in the order of the Magistrate made under chap. xl of the present Code of Criminal Procedure, it is barred under art. 47, sched. ii, Act XV of 1877. No doubt the order, being passed on the 30th June

1875, comes under the operation of the former Limitation Act, IX of 1871. But by s. 2 and sched. v of Act X of 1872, chap. xl of that Act (X of 1872) has been substituted for chap. xxii of Act XXV of 1861; consequently the order of the Magistrate, which is the cause of action in this suit, is governed by the provisions of Act XV of 1877. We are unable to assent to the argument that the property, to recover which a suit may be brought under art. 47, is moveable property only. It seems to us to have reference to immoveable as well as moveable property. This view is in accordance with that of the Madras Court in the case of *Akilandammal v. Periasami Pillai* (1).

[The rest of the judgment is not material for the purposes of this report.]

Before Mr. Justice McDonell and Mr. Justice Field.

GOLUK CHUNDER MAHINTA AND OTHERS (DECREE-HOLDERS) v.
SURBOMANGALA DABI AND ANOTHER (JUDGMENT-DEBTORS).*

1881

KANGALI
CHURN
SHA
".
ZOMUR-
RUDONNISSA
KHATOON.

1881

Feb. 11.

Execution of Mortgage-Decree—Beng. Act VII of 1868—Sale of mortgaged Property—Surplus Sale-Proceeds—Attachment of Surplus Sale-Proceeds.

The purchaser of property, sold subject to the incumbrances thereon, at a sale under Beng. Act VII of 1868, subsequently became the purchaser of a decree passed prior to the sale in a suit upon a mortgage of the property, such decree being declared not only a charge on the mortgaged property, but also personal against the mortgagor.

Held, that the purchaser was not entitled to execute the decree against the surplus sale-proceeds under such sale, although he abandoned his lien on the property.

In this case it appeared that certain property belonging to the judgment-debtors had been put up for sale under the provisions of Beng. Act VII of 1868, and had been purchased by the petitioners, subject to the incumbrances then existing thereon, amongst which was a mortgage-decree, which was

* Appeal from order, No. 300 of 1880, against the order of Baboo Bany Madhub Mitter, Subordinate Judge of Backergunge, dated the 17th August 1880.

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CHUNDER
MAHINTA
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SURBO-
MANGALA
DABI.

declared to be both personal against the judgment-debtors as well as a charge upon the property. After the sale a portion of the decree was purchased by the petitioners, or by some persons on their behalf, and they then, after having paid off some of the other incumbrances on the property, applied to be allowed to execute that decree against the surplus sale-proceeds, which were then in the Collectorate at the credit of the judgment-debtors. The latter objected, on the ground that the decree-holders were bound first to proceed against the property, the subject of the mortgage, and then, if the decree remained unsatisfied, they might attach the surplus sale-proceeds. Thereupon the petitioners relinquished their lien on the property, and applied for permission forthwith to attach the surplus sale-proceeds. The Subordinate Judge, relying on *Mirza Futeh Ali v. Gregory* (1), *Lalla Mitterjeet Singh v. Scott* (2), and *Byjonath Sahoy v. Doolhun Biswanath Koor* (3), held, that they were first bound to attach and sell the mortgaged property, and then, if the proceeds of such sale were insufficient to satisfy their decree, they were at liberty to attach the other properties of the judgment-debtors, but that the latter were not to be allowed to take out the surplus sale-proceeds then in the Collectorate until further orders.

Against this order the petitioners appealed to the High Court.

Baboo *Mohiny Mohun Roy* and Baboo *Jogesh Chunder Roy* for the appellants.

Baboo *Busunto Coomar Bose* for the respondents.

The judgment of the Court (McDONELL and FIELD, JJ.) was delivered^{by} by

McDONELL, J.—We think that the order of the Subordinate Judge in this case ought not to be interfered with, though we do not agree with the reasons upon which he has based his decision. The property, Bazzapti Mehal Kulliarthur, belonged

(1) 6 W. R., Mis. Rul., 13. (2) 17 W. R., 62. (3) 24 W. R., 83.

to the judgment-debtors. They mortgaged it to one Kalachand Mahinta. Kalachand brought a suit upon the mortgage-bond and obtained a decree, which was a personal decree against the judgment-debtors, and also a decree against the mortgaged property. Meanwhile the mortgaged property was brought to sale under the provisions of s. 16 of Beng. Act VII of 1868. That sale was in all respects the same as a sale in execution under the Code of Civil Procedure; in other words, it was a sale of the right, title, and interest of the judgment-debtors. The right, title, and interest of the judgment-debtors was, therefore, the equity of redemption. The sale under Beng. Act VII of 1868 took place on the 26th of July 1878; and the appellants in the present case became, either directly or through a mesne conveyance, the purchasers of the interest which passed by this sale.

We are satisfied upon the facts, although the property was purchased in the name of a lady, that the appellants in the present case were the real purchasers. That being so, the appellants, on the 1st of September 1878, purchased a moiety of the mortgage-decree obtained by Kalachand, and which at that time was unexecuted. We may observe that, in our opinion, they were in the same position as purchasers of this moiety as if they had purchased the whole decree. Meanwhile a sum of money, the surplus sale-proceeds of the sale under Beng. Act VII of 1868, was lying in deposit in the Collectorate; and the appellants now seek to execute the decree purchased by them against those sale-proceeds. The Subordinate Judge has decided that they are not entitled to do this, and he relies upon the cases of *Byjonath Sahoy v. Doolhun Biswanath Kooer* (1) and *Lalla Mitterjeet Singh v. Scott* (2), which were decided upon a principle not directly applicable to the present case. The simple aspect of this case is as follows: The appellants purchased the property subject to the mortgage lien. Whether notice of the mortgage was or was not distinctly given at the time of the sale under Beng. Act VII of 1868 is not very material. All that could have been sold was the right, title, and interest of the judgment-debtors; and that

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(1) 24 W. R., 83.

(2) 17 W. R., 62.

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right, title, and interest, seeing that the property had been mortgaged, consisted merely of the equity of redemption. If the purchasers at that sale omitted to make proper inquiries and so ascertain the existence of the mortgage lien, such laches will not alter the effect of the sale. Having then purchased the equity of redemption, the appellants next bought in the mortgage lien; and to our minds the effect of this was, that the appellants became entitled to hold the property discharged from the lien; but they contend that they are entitled to something more. They seek to execute the mortgage-decree against the surplus sale-proceeds, which must be taken to represent the value of the equity of redemption; that is, having purchased and paid for the equity of redemption and the mortgage lien, they now desire not only to have the unincumbered property, but also to get back the whole of the price which they have paid for the equity of redemption.

We think that they cannot be allowed to do this.

Under these circumstances, we think that so much of the order of the Subordinate Judge as directs the surplus sale-proceeds not to be taken out until the further orders of the Court, which is in fact an attachment of these sale-proceeds, until the judgment-debtors have proceeded against the property, must be expunged. In other respects, the order of the Subordinate Judge will be confirmed.

Lower Courts' order modified.

APPELLATE CRIMINAL.

Before Mr. Justice Cunningham and Mr. Justice Prinsep.

1881
Feb. 28.

IN THE MATTER OF THE PETITION OF DEELIA MAHTON (PETITIONER) v.
SHEO DYAL KOERI (OPPOSITE PARTY).*

Evidence—Summoning Witnesses—Refusal of a Magistrate to summon Prisoner's Witnesses—Criminal Procedure Code (Act X of 1872), s. 359.

A Magistrate is not at liberty to refuse to summon a witness tendered by an accused person, except on the grounds specified in s. 359 of the Criminal

* Criminal Motion, No. 30 of 1881, against the order of E. Stewart, Esq., Deputy Magistrate of Barh, dated the 22nd November 1880.

Procedure Code; and if he does refuse, he is bound to proceed under that section. The fact that the accused declines to examine a witness is no reason for refusing to summon him to meet fresh evidence given subsequent to the defence being closed.

1881
IN THE
MATTER OF
THE
PETITION OF
DEELA
MAHTON.

Mr. R. E. Twidale appeared for the petitioner on this motion.

The facts of this case appear sufficiently, for the purposes of this report, from the judgment of the Court (CUNNINGHAM and PRINSEP, JJ.), which was delivered by

CUNNINGHAM, J.—We think that the Magistrate was not at liberty to refuse to summon the witnesses tendered by the accused, except on the grounds specified in s. 359 of the Code of the Criminal Procedure; and that if he did refuse on those grounds, he ought to have proceeded under that section. The fact that the accused stated that they did not wish to examine those witnesses when the case closed, was no reason for refusing to summon them to meet fresh evidence which had been taken by the Magistrate after hearing the arguments on behalf of the defence. We must, accordingly, direct that the proceedings be recommenced from that stage, and that the Magistrate do either take the evidence or record his reasons for not doing so, and proceed as directed by law.

Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Morris and Mr. Justice Tottenham.

SUNDHYA MALA (ONE OF THE DEFENDANTS) v. DABI CHURN DUTT
AND OTHERS (PLAINTIFFS).*

1881
Feb. 16.

Res judicata—Civil Procedure Code (Act X of 1877), s. 13.

The plaintiff sued to recover certain lands, claiming them as a portion of A, and alleging that A was portion of a mouza which had been leased to him in patni by the zemindar. The suit was dismissed, on the ground that

* Appeal from, Appellate Decree, No. 890 of 1879, against the decree of Baboo Kally Doss Dutt, Second Subordinate Judge of Tipperah, dated the 23rd January 1879, affirming the decree of Baboo Ram Chunder Dhur, Munsif of Chauki Nasirnugger, dated the 28th February 1878.

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though *A* was known as a part of the plaintiff's mouza, yet it had been included in a patni lease of an adjoining mouza, which the zemindars had granted to the defendants previously to the date of the plaintiff's lease. The plaintiff brought a second suit claiming another portion of *A* on the same title.

Held, that the claim was barred as *res judicata*.

Mohidin v. Muhammad Ibrahim (1), *Nund Kishore Singh v. Hurree Pershad Mundul* (2), *Pran Nath Sandyal v. Ram Coomar Sandyal* (3), and *Gobind Chunder Koondoo v. Turuck Chunder Bose* (4) followed.

THIS was a suit for possession of certain lands known by the name of Bund Mahata. The parcels in dispute, and which made up the whole of Bund Mahata, were described in three schedules annexed to the plaint and marked Nos. 1, 2, 3. The plaintiffs claimed that these lands were included in Mouza Mermah, a patni potta of which had been granted to them by the second defendant, their landlord, on the 15th Assin 1273 (28th June 1866); while the first defendant claimed them as included in a potta of an adjoining mouza, Mouza Simrail Kandi, which had been granted by the second defendant to her predecessor in title on the 6th Srabun 1272 (20th July 1865).

It appeared from the evidence that a previous suit had been brought by the plaintiffs against the first defendant in 1872, for the lands comprised in schedules Nos. 2 and 3, on the same title as that put forward in the present case. That suit, which was carried up to the High Court on appeal, was dismissed with costs, on the ground that though Bund Mahata was in reality a portion of Mouza Mermah, yet it was included in the first defendant's potta, which being prior to that of the plaintiffs, of course, prevailed. Some time after the decision just mentioned, the plaintiffs brought a suit for arrears of rent against one Panye, who then held the lands included in schedule No. 1, but the suit was dismissed, on the ground that the lands did not belong to the plaintiffs. The present suit was then brought, and the chief contention was whether the claim was *res judicata*. The Court of first instance and the Court of appeal held, that the claim was barred as to the lands included in schedules Nos. 2 and 3, but gave the plaintiffs a decree for possession of the lands included in schedule No. 1. The first defendant appealed to the High Court.

(1) 1 Mad. H. C. Rep., 245.

(3) 2 C. L. R., 33.

(2) 13 W. R., 64.

(4) I. L. R., 3 Calc., 145.

Baboo *Doorga Mohun Doss* and Baboo *Bhoobun Mohun Doss*
for the appellants.

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Baboo *Hurry Mohun Chuckerbutty* for the respondents.

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The judgment of the Court (MORRIS and TOTTENHAM, JJ.)
was delivered by

MORRIS, J.—We think that this appeal must prevail upon the authority of the decisions which have been quoted to us, viz., *Mohidin v. Muhammad Ibrahim* (1), *Nund Kishore Singh v. Hurree Pershad Mundul* (2), *Pran Nath Sandyal v. Ram Coomar Sandyal* (3), and the Full Bench decision in the case of *Gobind Chunder Koondoo v. Taruck Chunder Bose* (4). It is clear that the self-same right and title, which are in issue in this case, have been substantially in issue and adjudicated upon in the previous case decided between the same parties on the 9th December 1874. In that case the subject of dispute was a plot of land forming part of what is called Bund Mahata; it was claimed by one side as appertaining to Mermah, and by the other side as appertaining to Simrail Kandi, and each party set up a certain potta from the same lessor in proof of title. It was found that although the land of Bund Mahata appertained to Mouza Mermah, yet, under the potta of the defendant, which was prior in date to that of the present plaintiffs, the superior title rested in the defendant. There, too, in respect of another portion of Bund Mahata, the same title is set forth, and therefore it seems to us that the principle of *res judicata* applies.

The judgments of the lower Courts are reversed, and the suit of the plaintiffs dismissed, with costs in all Courts.

Appeal allowed.

(1) 1 Mad. II. C. Rep., 245.

(3) 2 C. L. R., 33.

(2) 13 W. R., 64.

(4) I. L. R., 3 Calc., 145.

APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice Maclean.

1881
Feb. 18.

IN THE MATTER OF THE PETITION OF JUBDUR KAZI AND GOLAB KHAN.
THE EMPRESS v. JUBDUR KAZI AND GOLAB KHAN.

Practice — Cumulative Sentence — Separate Charges — Criminal Procedure Code (Act X of 1872), s. 454, illus. (f)—Penal Code (Act XLV of 1860), ss. 147, 148, and 324.

Under s. 454 of the Criminal Procedure Code, the collective punishment awarded under ss. 147, 148, and 324 of the Penal Code must not exceed that which may be awarded for the graver offence.

Quære.—Whether separate convictions under ss. 147 and 324 of the Penal Code are legal?

THESE two appeals arose out of the same trial. The prisoners Jubdur Kazi and Golab Khan having been members of an unlawful assembly, some of whom were armed with spears and shields, and some with lathes, which took place on the 12th Kartick 1256, corresponding with the 28th October, 1879, and resulted in the death of one man named Guru Churn, and in severe injury to another named Babul Chund. The prisoners were charged, along with others, on several charges under the Indian Penal Code, but the Sessions Judge, concurring with the assessors, acquitted Jubdur Kazi of the graver charges under s. 302 and s. 304, and Golab Khan of those under s. 324 and s. 326; but convicted them both under s. 148 and also under s. 149, coupled with s. 324, and sentenced them each, under s. 148, to three years' rigorous imprisonment; and further, under s. 149, coupled with s. 324, to a further term of two years' rigorous imprisonment, to commence on the expiry of the former sentence; and further sentenced the first prisoner Jubdur Kazi, under s. 148, to pay a fine of Rs. 200, or in default to suffer a further term of six months' rigorous imprisonment. Against these sentences both the prisoners appealed to the High Court.

* Criminal Appeals, Nos. 22 and 15 of 1881, against the order of C. A. Kelly, Esq., Sessions Judge of Furrirdpore, dated the 17th November 1890.

Mr. *L. M. Ghose* and Baboo *Boido Nath Dutt* for the appellant Jubdur Kazi.

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TER OF THE
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GOLAB
KHAN.

Baboo *Juggodanund Mookerjee* for the Crown.

No one appeared on behalf of the other appellant, Golab Khan.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J.—These appeals arise out of the same trial. The appellants have been convicted of being members of an unlawful assembly, in which one Guru Churn received fatal injuries and one Babul Chund was less severely hurt.

It seems that they were acquitted of any offence as respects the death of Guru Churn, the conviction being for rioting armed with deadly weapons under s. 148, and for hurt caused to Babul Chund under s. 324, read with s. 149 of the Penal Code. The periods awarded being three years under s. 148, and two years under ss. 149 and 324.

The learned counsel who appeared for Jubdur Kazi, appellant in No. 22, confined himself to urging that the sentences passed upon his client were in excess of what could be passed according to law, and that the injuries caused to Babul Chund by one of the members of the unlawful assembly, not found to be his client, were not caused in prosecution of the common object of the assembly.

The learned counsel's contentions apply equally to the case of Golab Khan, for whom, however, he did not appear.

The first point turns upon s. 454 of the Criminal Procedure Code, which provides for collective punishment either for one offence falling within two separate definitions of law, or for acts severally constituting more than one offence, but collectively coming within one definition. In the former case one punishment, and in the latter separate punishments, may be awarded; but in the former case it must not exceed what can be awarded for either offence, and in the latter they must not collectively amount to more than could have been awarded for any one of

1881 the several offences, or for the combined offence. Illustration
IN THE MAT- (f), which is referred to by the Judge, shows that offences under
TER OF THE PETITION OF ss. 147, 324, 152 may be separately dealt with.

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In this case the conviction is for offences under ss. 147 and 324, and this Court has held that separate convictions under those sections are not legal: *vide* the case of *Queen v. Durzoola* (1). There is, however, a contrary ruling in the case of *Queen v. Callachand* (2), followed apparently in *Empress v. Ram Adhin* (3); but whether there can be separate convictions or not, it is certain that, under s. 454, Criminal Procedure Code, the collective punishment must not exceed that which may be given for the graver offence: *Reg. v. Tukaya Bin Tamana* (4).

We shall, therefore, reduce the sentences on these appellants to three years in each case.

It is not necessary to discuss the second question raised in the appeal of Jubdur Kazi.

Sentence modified.

PRIVY COUNCIL.

P. C.*
1880
Nov. 12.

BHUBANESWARI DEBI (ONE OF THE DEFENDANTS) v. HARISARAN
SURMA MOITRA (PLAINTIFF).

[On Appeal from the High Court at Fort William in Bengal.]

Evidence—Secondary Evidence of Contents of Document.

By the law of evidence administered in England, which has been in a great measure, with respect to deeds, made the law of India, the first condition of the right to give secondary evidence of the contents of a document not produced in Court, is the accounting for the non-production of the original.

APPEAL from a decree of the High Court of Bengal (22nd December 1874), modifying a decree of the Subordinate Judge of the District of Rungpore (13th December 1872).

* Present:—SIR J. W. COLVILLE, SIR M. E. SMITH, and SIR R. P. COLLIER.

(1) 9 W. R., Cr., 33.

(3) I. L. R., 2 All., 139.

(2) 7 W. R., Cr., 60.

(4) I. L. R., 1 Bomb., 214.

The suit, out of which this appeal arose, was brought by the daughter and heiress of one of the five sons of Romanath Lahiri, deceased, to obtain a declaration of her right to that son's full share in the paternal joint estate. For the defence was set up the fact of an unequal distribution among the sons having been made many years before; and, in order to prove it, reference was made to two written instruments. Of these one was an "anumati patro," purporting to have been executed by the plaintiff's grandfather, Romanath Lahiri, in Kartick 1233, or by the English style, October 1826. The other was an instrument of sale alleged to have been executed by the plaintiff's mother when in possession of her husband's (the plaintiff's father's) share, as his widow and heiress, of a portion of that share. The "anumati patro" of 1826 was not produced.

The first Court held that there was sufficient evidence of this document, but not of the instrument of sale, having been executed. The High Court held, that neither document was proved to have been made as alleged.

The principal question in this appeal was, whether secondary evidence of the contents of the "anumati patro" was admissible, that evidence having been held inadmissible in the High Court.

Mr. *R. V. Doyne* appeared for the appellant.

Mr. *C. W. Arathoon* for the respondent was not called upon.

The facts of the case are stated in their Lordships' judgment, which was delivered by

SIR R. P. COLLIER.—The facts necessary to the understanding of this case are as follows:—Romanath Lahiri, who died in October 1831, had five sons, and left a widow, who died in the year 1849. One of his sons, Roghoomoni, died in 1842, leaving his widow and heiress Chundramoni, who died in October 1858, leaving Uma Soonderi heiress to her father; she was the plaintiff in this suit. Her son has been since substituted, but it will be convenient to treat her as the plaintiff. She sued as defendants, three members of the family, viz., the widow of

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Sibnath, the youngest son of Lahiri, who died about May 1861, having been the manager of the property from his father's death to that time; Nilcomul, who was a son of the third son of Romanath Lahiri; and Konuk Tara, the widow of the eldest son of Romanath Lahiri. Neither Nilcomul nor Konuk Tara appears in this appeal, the only appellant being Bhubaneswari, widow of Sibnath. The claim of the plaintiff was in right of her father to a fifth share of the property of her grandfather, and of the accretions to that property which had subsequently accrued during the management of Sibnath. With reference to the property left by the grandfather, she admitted that she had been in possession for some time of a two-anna share. Therefore she only claimed the difference between that 2 annas share and the fifth,—that is to say, an one-anna and four-ganda share. With respect to the rest, the subsequent accretions, she claimed the fifth, being 3 annas and 4 gandas. It has been found by both Courts that these accretions consisted of acquisitions made by Sibnath out of the family property, and not, as he contended, out of his separate funds, and therefore they became part of the family property, the family remaining joint, as has been found by both Courts, until the death of Sibnath.

The main defence to the claim of the plaintiff consisted of two deeds set up by the defendants. The first is called a deed of "anumati patro," alleged to have been executed by Romanath Lahiri in 1826, wherein he made a distribution of his property somewhat different from that which would have been made by the law. According to that deed, as alleged by the defendants, he retained a 3-anna share of the property for himself, he gave a 3-anna share of it to his eldest son, and a $2\frac{1}{2}$ -anna share to each of his four younger sons; and therefore, under that deed, it was contended by the defendants that the share of the plaintiff, instead of being to a fifth, was to only to a $2\frac{1}{2}$ -anna share. It was further contended that Chundramoni, the mother of the plaintiff, during her widowhood, viz., in 1856, had executed another deed, whereby she had sold to Sibnath one-fifth of her $2\frac{1}{2}$ -anna share, that is, a $\frac{1}{2}$ -anna share, in consideration of money advanced by Sibnath, and of Sibnath having, as was alleged by the deed, paid a portion of his father's debts out of

his own property. With respect to this deed the findings of the Court are as follows:—The Judge of first instance doubted its execution by Chundramoni; he thought that, if executed, the execution was obtained from her by fraud and coercion, and he was further of opinion that no consideration for it had been proved. The High Court agreed with him, at all events on the latter point, and the result is, that, by the judgment of two Courts on what is a question of fact, that deed has no validity, and may be at once disposed of.

The two Courts differ with respect to the first deed; the Judge of first instance holding that the deed had been properly proved—that is to say, that secondary evidence of it was admissible and had been sufficiently given, the deed itself not being produced. The High Court were of opinion, in the first place, that the original deed had not been sufficiently accounted for to admit secondary evidence of its contents; and, secondly, that if secondary evidence were admissible, satisfactory secondary evidence had not been given. It is necessary, therefore, to inquire how the case stands with reference to this deed.

Their Lordships can entertain little or no doubt that a deed of the description which the defendants allege was executed by Romanath Lahiri. Such a deed is referred to in some judicial proceedings. It is referred to in a proceeding in the year 1832, whereby it appears to have been filed by one Kasinath Moitra, who then acted as a solicitor for some of the members of the family. It is also shown to have been filed in 1837 by the same person and returned to him. It further appears that what may be assumed to be the same deed was filed in the Court of Goalpara in 1857 by Ramottum Mullik, who acted on behalf of Konuk Tara, widow of the eldest son, and one of the defendants in this suit, though said to be only *pro forma* a defendant. It appears that Ramottum Mullik, who was the muktear of this lady, obtained a copy of this deed; and further that he got back from the Court the original and signed a receipt for it on the 7th December 1857. There may possibly be a question whether Mullik was or was not authorised to act on behalf of this lady, but it appears to

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their Lordships that, whether he was or not, the custody of the deed is tolerably well shown. If Mullik acted on behalf of the lady, the presumption would be, that he returned the deed to her. If he did not act on her behalf, it is shown to be in his custody, and has not been shown to have come out of it. Under these circumstances it appears to their Lordships that the very first duty of the defendants was to endeavour to obtain the deed from the custody either of Ramottum Mullik or of Konuk Tara, one of the defendants. But no attempt whatever appears to have been made to obtain it from either of them, or even to inquire whether or not it was in their custody, or in whose custody it was. In short, no search for it, or inquiry respecting it, of any kind, has been shown. Under these circumstances, by the law of this country, which has been in a great measure, with respect to deeds, made the law of India, it appears to their Lordships that the first condition of the defendants' ability to give secondary evidence—namely, the accounting for the nonproduction of the original—has not been complied with; and on that ground they are of opinion that the judgment of the High Court was right, and that secondary evidence was not admissible. That being so, it is not necessary to determine whether, if secondary evidence was admissible, the evidence given was sufficient. Their Lordships do not, however, desire to indicate any difference of opinion between themselves and the High Court upon this subject.

It has, indeed, been further argued by Mr. Doyne that the general conduct of the family shows that a family arrangement, such as is contained in this deed, was acted upon and recognised by the family. But whatever arrangement there was, according to his case, was under a deed, and at the most the evidence which he relies upon, the conduct of the family, could have no greater effect than to corroborate the secondary evidence of the contents of the deed, if secondary evidence were admissible.

The only other aspect in which the conduct of the family could be held to be material would be with respect to the application of the Statute of Limitations, that conduct tending to show that there had been a partition beyond the statutable

period. But here again there is a finding of two Courts that there was no division of the family until May 1861, within the period of limitation.

Under these circumstances, their Lordships are of opinion that the judgment of the High Court was right, and they will humbly advise Her Majesty to affirm that judgment and to dismiss this appeal with costs.

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Appeal dismissed.

Solicitors for the appellant: Messrs. *Oehme and Summerhays.*

Solicitor for the respondent: Mr. *T. L. Wilson.*

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice White, and Mr. Justice Maclean.

KALLY CHURN SAHOO AND OTHERS (PLAINTIFFS) v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT).*

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Suit for Possession—Diluvion—Possession on Re-formation—Subsequent Diluvion—Possession—Limitation Act (IX of 1871), sched. ii, arts. 143, 145.

Per GARTH, C. J.—Where a person can show that he has been in possession of certain lands prior to such lands becoming diluviated, his possession must be considered as continuing during the time of diluvion, until such time as he becomes dispossessed by some other person; and in such a case, the onus lies upon the dispossessor to show that he has acquired a title under the law of limitation which has put an end to the rights of the original possessor.

Koowar Singh v. Nund Loll Singh (1) and *Radha Gobind Roy v. Inglis* (2) distinguished.

Per WHITE, J.—The dispossession, or discontinuance of possession, mentioned in art. 143, sched. ii of Act IX of 1871 is that which occurs where the property is taken actual possession of by another, and does not apply to the

* Appeal from Appellate Decree, No. 717 of 1879, against the decree of J. M. Lewis, Esq., Judge of Bhaugulpore, dated the 10th January 1879, affirming the decree of Hafizabul Kurim, First Subordinate Judge of that district, dated the 13th May 1878.

(1) 8 Moore's I. A., 199.

(2) 7 C. L. R., 364.

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J. KALLY CHURN SAHOO v. SECRETARY OF STATE FOR INDIA IN COUNCIL.	Owners of land, which has suffered from successive diluviations and re-formations, must, if they wish to preserve their rights, bring their suit within twelve years of the time when adverse possession is first taken of land re-forming on the original site, whether at the time of suit the land is capable of occupation or is lying under water in consequence of a second diluvion.

THE plaintiffs, on the 7th September 1877, sued to recover possession of certain milik lands, in Mouza Ghurghut, which they alleged to be part of their estate. They stated that the greater portion of these lands had become diluviated prior to 1847, at which time a survey had been made, and the lands in question had been entered in the thak and compass maps of Mouza Ghurghut Milik; that before the next survey in 1865, accretion had commenced, but the lands again became diluviated in 1869; that the lands commenced to re-form in 1870-71, and had become culturable in 1874-75, at which time the defendant wrongfully took possession of them, notwithstanding the fact that the plaintiffs had, during the time of diluviation, paid Government revenue to the defendant. The defendant contended that the land did not belong to the plaintiffs' estate, but that it formed part of an adjoining estate called Binda Deara belonging to him; that, in consequence of certain disputes as to the boundary of the defendant's estate, a survey had been held in 1865, and the lands determined to be a part of Binda Deara, and that from that date up to 1869 the land had been held by him. That, in 1869, the land again became diluviated; that on its re-formation in 1875, he had again taken possession of it; and that even supposing the plaintiffs to be entitled to the land, their suit was now barred.

The Subordinate Judge found that, according to the evidence of the defendant's witnesses, which was supported by the survey proceedings of 1865, the land had, on the first accretion, been taken possession of by the defendant, and that he must be held to have been in possession of it during the time of diluvion, up to the time of the second accretion; and that, therefore, the present suit, being brought more than twelve years after 1865, was barred.

The plaintiffs appealed to the Subordinate Judge, who held that the plaintiffs had not proved that they had been in possession of the land within twelve years prior to the institution of the suit, and that therefore the suit was barred.

The plaintiffs appealed to the High Court.

The Judges of the High Court (WHITE and MACLEAN, JJ.) differed in opinion; the case was referred to the Chief Justice under s. 575 of the Civil Procedure Code, and re-argued before the three Judges.

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Mr. C. Gregory (with him Baboo Ram Churn Mitter), for the appellants, contended, that the suit was not barred, inasmuch as the cause of action did not arise in 1865, but arose at the time when the lands last appeared in 1875; that the survey proceedings of the Collector, in 1865, were not evidence against the plaintiffs, they being no party to such proceedings; and that the fact of the defendant being in possession in 1865 was of no value, as the land had been washed away since that, and that during such diluvion there was nothing for the plaintiffs to sue for; that if the defendant took possession of the land in 1865, it was as a trespasser; and that the land being diluviated in 1869, his possession as trespasser ceased, and the plaintiffs must be held to have been in possession from that time."

Baboo Unnoda Prasad Banerjee for the respondent contended, that the possession of defendant did not cease during the diluvion, he having been in possession previously thereto, and that the suit was barred under art. 145, sched. ii, Act IX of 1871.

The judgments of the Court were delivered as follows:—

GARTH, C.J.—This suit is brought by the plaintiffs to recover from the defendant possession of about 140 bighas of milik land, forming part of their estate of Mouza Ghurghut, for which they have paid rent to Government for many years past.

The plaintiffs say that this land was diluviated previously to 1865; that it then partially re-formed, and was diluviated again in 1869; that it reappeared in 1875, and was then wrongfully appropriated by the Government.

1881 The answer to the claim is, that the land in question does
 KALLY not belong to the plaintiffs' mouza at all, but forms part of
 CHURN an adjoining estate, called Binda Dearn, belonging to Govern-
 SAHOO ment; and that even if it does form part of the plaintiffs'
 v. mouza, it was surveyed by the Collector in the early part of
 SECRETARY 1865 as part of Binda Dearn, and was held by the Govern-
 OF STATE FOR ment as such until the year 1869, when it was again diluviated ;
 INDIA IN and that when it re-formed in 1875, it was taken possession of
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The defendant, therefore, says, that, in either case, the suit must fail. If the land is not part of the plaintiffs' mouza, the plaintiffs of course have no claim. If, on the other hand, it is part of the plaintiffs' mouza, then the suit is barred by limitation. The Limitation Act which governs the case is Act IX of 1871, and whether art. 143 or art. 145 applies, the defendant contends that the plaintiffs are equally barred.

Both the lower Courts have decided against the plaintiffs upon the plea of limitation. There has been no express decision, whether the land formed part of the plaintiffs' mouza or not; but it would seem that, in a survey map made in 1847, a portion of it, if not the whole, was demarcated as forming part of that mouza, and there certainly seems reason for supposing that, so far as the original title is concerned, the plaintiffs have a good case; but, as it is found that they have not been in possession for upwards of twelve years before suit, both Courts have held that their suit is barred.

On second appeal to this Court, as the learned Judges of the Division Bench differed in opinion, the case was referred to myself as a third Judge, and we have heard the whole matter argued again on both sides.

The plaintiffs contend, on the one hand, that even if it is shown that the Government took possession of the land in question previously to 1865, they did so as trespassers; and that as the land was diluviated again in 1869, their possession as trespassers then ceased, and the true owners of the property must be considered as having been in possession from that time till the Government again took possession in 1875. They contend that, strictly speaking, no one can be considered as in

actual possession of land covered by water, and that no suit could have been brought by the plaintiffs against the Government from 1869 to 1875; but that if any one is to be considered in point of law as constructively in possession whilst the land was diluviated, it is the true owner, and not a party who previously to the diluvion was a mere trespasser upon the property.

They say, moreover, that, apart from the question under the Limitation Act, the proceedings of the Collector in 1875 were improperly received in evidence in both Courts against the plaintiffs, as proving that previous to 1865 the Government had taken possession of the property, these proceedings not being evidence against the plaintiffs, who were not parties to them.

On the other hand, the defendant says, that as the Government was found to have held undisturbed possession from 1865 to 1875 under a claim of right, their possession did not cease at the time when the land was diluviated in 1869, but must be presumed to have continued until it re-formed in 1875; that, during all that time, the plaintiffs might, if they pleased, have brought a suit against the Government to recover possession; and that, consequently, the possession of the Government has been continuous from the beginning of 1865 to the present time. They contend, moreover, that, having regard to the strict language of arts. 143 and 145 of the Limitation Act, the suit is barred, and as regards the evidence upon which the lower Courts founded their decision, they say that there was oral evidence, besides that of the Collector's proceedings, to show that the Government took possession more than twelve years before suit.

Now it seems to me very clear, that if the plaintiffs in a case of this kind could show that the land in question was in fact a part of their mouza, of which they had been in possession before it was diluviated, their possession must be considered in law as continuing during the time of the diluvion, and, indeed, until they were dispossessed by some other party. It is not because land becomes covered with water, and it therefore becomes difficult or impossible for the owner

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to turn it to any useful purpose, that it therefore ceases to be in the owner's possession.

It seems to me, that the possession of the owner in such a case must be deemed to continue during the diluvion, and in fact until he is proved to have been dispossessed by some other person; and I think that this view of the law is quite in accordance with *Lopez's case* (1), and with the decision of the Privy Council in *Radha Prosad Singh v. Ram Coomar Sing* (2). We certainly acted upon that principle in this Court in deciding the important case of *Mohunt Chutterbhooj Bharto v. The Secretary of State for India* (3), which, I believe, is not reported, but against which, so far as I am aware, no appeal has been preferred.

The plaintiffs in that case were shown to have been in possession of an estate in the year 1846, which soon afterwards became diluviated, and upon its reappearance many years afterwards, it was taken possession of by the Government, and resettled with other persons. We held, that, under such circumstances, the plaintiffs' possession must be considered as continuing during the period of diluvion and until possession was shown to have been taken of the land by the Government.

It is contended by the defendant that this principle is opposed to the law as laid down by the Privy Council in the case of *Moharajah Koowur Singh v. Nund Loll Singh* (4), and with other cases decided by this Court in accordance with what was supposed to be their Lordships' view. See *Syud Ameer Ali v. Maharani Indurjeet Koor* (5), *Niljaree v. Mujeboollah* (6), *Koomar Runjit Singh v. Schoene, Kilburn* (7), and *Muhammed Ibrahim v. M. B. Morrison* (8). Some of these cases appear to have turned rather upon the question, on whom the onus of proof lies in a suit for dispossession, than upon the question, whether the possession of an owner of diluviated land is presumed by law to continue during the period of the dilu-

(1) 13 Moore's I. A., 467.

(2) I. L. R., 3 Calc., 800.

(3) Reg. Ap., No. 184 of 1877.

(4) 8 Moore's I. A., 199.

(5) 15 W. R., 43.

(6) 19 W. R., 209.

(7) 4 C. L. R., 390.

(8) I. L. R., 5 Calc., 36.

vion. But the two questions are often almost inseparable in cases of this kind; and it certainly seems rather difficult at first sight to reconcile the case of *Moharajah Koowur Singh v. Nund Loll Singh* (1) with the late decision in *Radha Gobind Roy v. Inglis* (2), which, as it seems to me, lays down the true rule upon the subject very clearly.

In the case of *Moharajah Koowur Singh* (1), the plaintiff brought his suit to recover a large tract of land, which, as he contended, had been adjudged to be part of his estate of Gopaulpore by certain decrees made in suits between his own and the defendants' ancestors, in the year 1816. The defendants, on the other hand, contended, that by those very decrees the land in question had been adjudged to be part of their estate of Rampore. There was considerable difficulty in ascertaining which of the parties was right in this contention, but it was admitted that, as regards possession, the defendants had been possessed of the disputed land for at least eleven years before suit, and the plaintiff had not proved to the satisfaction of the Court that he was in possession within twelve years before suit. The law of limitation in force, when the suit was brought, was the Beng. Reg. III of 1793, s. 16.

Upon this state of facts their Lordships say:—

“Again, their Lordships concur with the majority of the Sadr Court in thinking that the issue of possession is the first to be considered in this case, and that it is wholly independent of the boundary question. The appellant is seeking to disturb the possession, admitted to have existed for about eleven years, of the defendants, who insist on a possession of much longer duration as a statutory bar to the suit. It clearly lies on him to remove that bar by satisfactory proof that the cause of action accrued to him (for that is the way in which the Regulation puts it) on dispossession within twelve years next before the commencement of the suit; and therefore, that he, or some person through whom he claims, was in possession during that period. No proof of anterior title, such as would be involved in the decision of the boundary question in his favour, can relieve him from this burden, or shift it upon his

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(1) 8 Moore's I. A., 199.

(2) 7 C. L. R., 364.

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adversaries by compelling them to prove the time and manner of dispossession."

This would seem to show that, according to the law then in force, a plaintiff bringing a suit upon a dispossession by the defendant, although he may have proved a clear title, *is also bound to show that he has had actual possession of the property within twelve years before suit.* Otherwise he must fail. On the other hand, the case of *Radha Gobind Roy v. Inglis* (1) was as follows:—

The plaintiff sued to recover possession of certain land, which, as he alleged, formed part of his estate, but which was originally covered by water, and formed a large bheel or lake. He alleged that of late years the water had receded from this land, so that it had become dry and culturable; that it had then been taken possession of by the defendant; and that, in certain proceedings which had been taken under s. 530 of the Criminal Procedure Code, the Magistrate had decided the question of possession in favor of the defendant.

The plaintiff then brought his suit to recover possession from the defendant, and the first question raised was one of title. This was decided in favor of the plaintiff; and the Privy Council further found upon the evidence, that one Bebi Luchmi, who was the plaintiff's predecessor in title, was many years ago the possessor, under the Government, of the talook, of which the land in question formed a part.

The defendant was thus driven to rely upon his possession, which had, undoubtedly, been found by the Magistrate in his favor; and considering the nature of the case, and the difficulty in ascertaining when the bed of the bheel had become dry, and had first been taken possession of by the defendant, the question upon whom the onus of proving the dispossession lay became a very material one.

Upon this point their Lordships say:—"The question remains, whether the disputed land, which must now be taken all to be within the yellow line, had or had not, been occupied by the defendant for twelve years before the suit was instituted, so as to give him a title against the plaintiff by the operation

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of the Statute of Limitation. On this question, undoubtedly, the issue is on the defendant. The plaintiff has proved his title; the defendant must prove that the plaintiff has lost it by reason of his (the defendant's) adverse possession. The High Court came to the conclusion that the defendant had not satisfied the burden of proof thrown upon him, and their Lordships are not prepared to reverse that judgment."

Now here, as in the case of *Moharajah Koowar Singh* (1), the suit was brought *as upon a dispossession by the defendant*. The Limitation Act which governed the case was Act IX of 1871; and I am not aware that there had been, since the year 1846, any change in the law as to the party upon whom the onus of proof lies in such a case, or as to the nature of the proof which a plaintiff bringing such a suit is bound to bring forward.

The distinction, as I conceive, between the two cases is this: In the case of *Moharajah Koowar Singh* (1) *the plaintiff had not proved any possession at all of the land in dispute at any time before suit*. He had only attempted to prove a title to it under the decree of 1816. And their Lordships say, that even if he had proved such a title, there was no proof of his possession, either actual or constructive, within twelve years before suit. Whereas in the case of *Radha Gobind Roy* (2), the plaintiff not only proved his title, but a possession in his ancestor, which was equivalent to a possession in himself; and that possession was presumed by their Lordships to have continued until the dispossession by the defendant; so that the onus was thrown upon the defendant to prove when his dispossession first occurred.

I am aware that this view of the law is opposed to several decisions in this Court; but I think that those cases have proceeded upon a misapprehension of the true meaning of the Privy Council. I consider myself bound to follow this last decision of their Lordships, which I trust will set the question at rest; and it certainly seems to me that any other view must needs be productive of the greatest injustice.

Take for example the case of an area of jungle land, which

(1) 8 Moore's I. A., 199.

(2) 7 C. L. R., 364.

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a man buys and takes possession of by going upon the land, laying down boundary marks, or the like. He does nothing more upon it for twenty years; and at the end of that time he finds a wrong-doer cultivating a portion of it, and he brings a suit against him to recover possession. Under these circumstances, unless the possession, which the true owner had twenty years before, is presumed to continue till the contrary is shown, the plaintiff's suit must fail. He may be quite unable to prove at what particular time the defendant first took wrongful possession; that must be a matter within the defendant's own knowledge. All the plaintiff would probably know, and all he could reasonably be expected to prove in such a case, is, that whereas he was possessed of the land and had a good title to it twenty years ago, he now finds the defendant wrongfully in possession. It is obviously unjust to oblige the plaintiff to prove, under such circumstances, when the defendant's dispossession first occurred. Every successive moment that the defendant holds wrongful possession of that land is a dispossession of the plaintiff. And it is surely enough for the plaintiff to prove *prima facie* his title and possession, and that the defendant has been in wrongful possession within twelve years before suit, leaving the defendant, if he can, to prove a statutory title by a twelve years' adverse possession. And the same with diluviated land: a man may prove title to and possession of land twenty-five years ago. The land is then diluviated for several years. It then reappears, and is taken possession of by a wrong-doer. The true owner finds the wrong-doer in possession and brings his suit. According to the rule laid down by the Privy Council, the onus lies upon the defendant to show that he has a twelve years' title by the law of limitation which has put an end to the plaintiff's rights.

And the same principle must surely apply in every case. There cannot be one principle applicable to the case of jungle land, or diluviated land, and another principle applicable to the case of other land. The Limitation Act and the Civil Procedure Code make no distinction between different kinds of land. The presumption must, in one case, be the same as in another. Dispossession must mean the same thing in one case as in

another, and the reason of the law applies equally in the case of cultivated land, as in the case of jungle land, or land covered by water.

A man may have been in possession of cultivated land fifteen years ago, but by reason of his absence from home, or from droughts or some other cause, he may have ceased to occupy it, and left the place for years. On his return he finds a wrong-doer in possession, and brings a suit to eject him. It seems to me that it would be, under such circumstances, a monstrous injustice to say that the burthen of proving exactly when the defendant took possession should be thrown upon the plaintiff.

In my opinion, therefore, if the plaintiffs in this case could have proved that the land in question formed part of their mouza, and that they were in possession of it before it was diluviated, the diluvion, although it lasted for more than twelve years, would not have affected their rights, if the dispossession by the defendant took place within twelve years before suit.

The plaintiffs' difficulty here is, that their dispossession by the Government is found by the lower Courts to have taken place in 1865 or earlier, at any rate more than twelve years before suit; and if that finding is correct, unless they can show that they have since resumed possession, either actually or constructively, it seems to me that their claim is barred.

But their contention is, that if the Government were in fact wrong-doers whilst they remained in possession from 1865 till 1869, no presumption ought to be made in favor of their possession continuing after the land became diluviated, as if they had been the rightful owners. But it seems to me very difficult to act upon that principle. If the Government had merely committed a casual act of trespass, that would not have had the effect of permanently disturbing or discontinuing the plaintiffs' possession. But if what they did amounted to putting the plaintiffs, the true owners, out of possession, and they kept possession themselves under a claim of right for so long a period as four or five years, I see no reason why the fact of the land becoming diluviated should be considered as putting an end to their possession. If this were the law, it would have a most

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important effect upon many titles in Bengal, which are founded upon adverse possession, because we all know that large tracts of land are always, more or less, covered with water during the rainy season; and if the fact of their becoming thus covered with water had the effect of putting an end to the possession of any person other than the true owner, and of restoring the true owner to possession during the time that the submersion continued, it would cause a very material change in the law of limitation.

I think, therefore, that if the Government were in possession under a *bonâ fide* claim of right at the time when the land became diluviated in 1869, their possession must be considered as continuing up to the time when they resumed actual possession, and therefore virtually up to the commencement of this suit.

It follows that, if the Government did actually take wrongful possession of the land in question more than twelve years before suit, the plaintiffs are barred, whether the case comes under art. 143 or art. 145 of the Limitation Act. If it comes under art. 143, the plaintiffs *were dispossessed* more than twelve years before suit; if it comes under art. 145, the possession of the Government *became adverse* more than twelve years before suit.

There are some points, however, in this case which in my opinion the lower Courts, and especially the lower Appellate Court, do not appear to have tried satisfactorily; and as the plaintiffs desire to have those points considered and decided, I think they are entitled to a remand for that purpose.

It should be distinctly ascertained by the lower Appellate Court, in the first place, whether the land in dispute, or any and what portion of it, formed part of the plaintiffs' mouza; and, in the next place, whether the Government took possession of that land, or any and what part of it, so long ago as twelve years before suit.

The plaintiffs are clearly entitled to any part of the property in question which belonged to their mouza, and which cannot be distinctly proved by the defendant by legal evidence to have been taken possession of by the Government at least twelve years before suit.

For the purpose of ascertaining these facts, the proceedings before the Collector are clearly not admissible as against the plaintiffs. The plaintiffs were no parties to them, and those proceedings were improperly admitted as evidence in the Court below. The lower Appellate Court will be at liberty to receive any fresh evidence that may be adduced by either party on the above points.

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If the plaintiffs establish their right to recover the land in question, or any part of it, they will be entitled to costs from the defendant, proportionate to the quantity of land recovered, in all the Courts, including the High Court.

If the plaintiffs can prove that the land in question, or any substantial part of it, formed part of their mouza, and they are defeated upon the plea of limitation only, each party will pay his own costs in this Court and in the lower Appellate Court; because in that case it will be clear that, the Government have been wrongfully appropriating land, which belongs, properly speaking, to the plaintiffs, *and for which the plaintiffs have been paying revenue* to them up to the present time. This would undoubtedly be a great injustice to the plaintiffs, and the attention of the proper authorities might, with good reason, be invited to the subject.

On the other hand, if the land in question never formed any part of the plaintiffs' mouza, it is only right that the plaintiffs should pay the defendant's costs in all the Courts.

WHITE, J.—This is an appeal against a decree of the District Judge of Bhaugulpore, confirming a decree of the Munsif, which has dismissed the suit of the appellants.

The object of the appellants' suit is to recover possession of certain chur land, on the ground that it had reformed on the site of a portion of milik land within their Mouza Ghurghut and lying to the north of the mal land of the same village. The quantity of land is stated in the plaint to be 139b. 14c. and 6d., but on measurement the Amin of the first Court has found it to be 140b. 3c. 6d. The appellants allege, and it does not appear to be disputed, that since the diluviation they have continued to pay revenue to Government for the whole of their milkeit land in Ghurghut.

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The Officiating Collector of Monghyr, on behalf of the Secretary of State for India, who is the respondent and the defendant below, alleges that the lands in suit does not form part of the milik lands of the plaintiffs' Mouza Ghurghut, but is parcel of Mouza Binda Deara, which belongs to Government. He further pleads that the plaintiffs are barred by the law of limitation. Both the lower Courts have held this suit to be barred.

The specific land which is sought to be recovered admittedly did not appear as dry land until 1875; and as this suit was brought on the 5th of September 1877, no question, under ordinary circumstances, could be raised founded on the law of limitation. But it is also admitted that, upon the site of the land in suit, land of nearly the same extent had previously appeared and been washed away. In other words, the site of the disputed land has been the subject of a double diluviation and a double re-formation of chur land within a comparatively recent period. It is out of this somewhat unusual circumstance, coupled with the fact the Government on both occasions of the re-formation took possession of the re-formed land, that the plea of limitation has been raised, and by the lower Courts sustained. The dates of the first diluviation and re-formation and of the possession taken by Government of the land that first re-formed are not given by the lower Appellate Court, but it seems that the site was diluviated for the first time shortly before 1847; that it continued for some years under water; that a year, or a few years, before 1865, land re-formed upon the site which Government then, or shortly before, took possession of, and which was nearly equal in extent to the land in suit; that Government kept possession of the re-formed land until 1869, when the site was again diluviated. In 1875, land was again formed upon the site and taken possession of by Government, in whose possession it still is.

The District Judge has held that it was for the plaintiffs to show that they had been in possession within twelve years before the suit, and that as they could not do this, their suit must fail.

The Judge has applied s. 141 of the Indian Limitation Act of 1871 (the Limitation Act which was in force when this suit was brought). But I think that the plaintiffs' suit does not fall

within that article or any of the other descriptions of suit specially provided for by Part VIII of the first division of the 2nd schedule of the Act, but it is governed by art. 145, which prescribes twelve years from the time when the possession of the defendant became adverse to the plaintiffs.

I think that the dispossession, or discontinuance of possession, mentioned in s. 140 is that which occurs where the property is taken actual possession of, or is capable of being taken such possession of, by another, and does not apply to the case where the property is submerged by the act of God, and so made impossible of occupation or actual possession.

Taking into account the admitted fact that land re-formed twice on the same site, and that on both occasions Government took possession of the land which so re-formed, the question is, when did the possession of Government become adverse to the plaintiffs?

When this case was first argued, I was of opinion that, as regards the land in suit, the period of limitation began to run against the plaintiffs when Government took possession of the land which re-formed in 1875. It appeared to me that as the possession which Government took of the land which re-formed on the site previously to 1865 was the possession of a wrong-doer, Government could not avail itself of the doctrine of constructive possession in order to connect its possession of the first re-formation in 1865 with its possession of the second re-formation in 1875; and that its possession of the first re-formation was in fact swept away or put an end to by the second diluviation. I was struck with the apparent hardship which was involved in a construction of the law of limitation which should permit a wrong-doer, who might have held possession of a newly-formed chur for only a year before it was again washed away, to oust the true owner in the event of land subsequently re-forming a second time, although an interval of twenty or more years might elapse before the second re-formation took place. It seemed to me contrary to justice that a wrong-doer's possession should thus ripen, as it were under the water, into a title, although his actual and possible occupation of the land in question only continued for a year.

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But after hearing the case reargued, and having had the advantage of reading the judgment which his Lordship the Chief Justice has delivered, I have come to the conclusion that my first opinion was wrong, and that as the law of limitation is at present framed by the Legislature, and as that law has been construed by this Court, Government is, in the case before us, entitled to date its adverse possession of the land in suit from the period when it first took possession of the land which first re-formed upon the present site.

Assuming, as I do, for the purpose of the argument on the question of limitation, that the land in suit on both occasions re-formed on the site of the plaintiffs' diluviated milkeit lands, the land, although under water, continued, after the first diluviation, in the constructive possession of the plaintiffs, until Government took possession of the lands which first re-formed on the site. That act of Government was admittedly an adverse act as against the plaintiffs, and put an end to their constructive possession. Until this suit was brought the plaintiffs did no act with a view to resume possession, and the adverse possession of Government, which commenced when it occupied the lands first re-formed, must be considered as continuing until this suit was brought, although for six years of the time its actual occupation ceased by reason of the second diluviation. It appears to me unnecessary to determine whether Government as a wrong-doer, when it first took possession, could be said to have constructive possession during the period of the second submersion. It is enough to say that the time began to run against the plaintiffs when Government first took adverse possession, and that, as the plaintiffs have not resumed or recovered possession before suit, it continued to run according to the ordinary law of computing the period of limitation, and this irrespective of whether the land was or was not capable of occupation by reason of its submersion.

The result of our decision will be that, in similar cases to the present, owners of land, which has suffered from successive diluviations and re-formations, must, if they wish to preserve their rights, bring their suit within twelve years of the time when adverse possession is first taken of land re-forming on the

original site, whether at the time of suit the land is capable of occupation or lying under water in consequence of a second diluviation. I have not in my experience known of a suit of this character being brought where the land in dispute at the time of suit had disappeared and formed part of the bed of a river; and I can foresee many difficulties in the way of such a suit, chiefly arising from the difficulty of identifying lands which are at the bottom of a river. But there is no doubt that such a suit would lie, and so long as land which is exposed to successive diluviations and re-formations is subject to the ordinary law of limitation, it will be a matter of prudence to bring such a suit.

I agree that the case should be remanded to the lower Appellate Court to try the questions mentioned in the judgment of the Chief Justice.

MACLEAN, J.—In this suit the plaintiffs claimed 139*b*. 14*c*. 6*d*. of land, which they alleged to be part of their estate Milik Ghurghut. They stated that the greater portion of the estate had diluviated before the “former survey,”—that is, before 1847. Before the next survey of 1865 accretion had commenced, but this was washed away in 1273 F. (1865-66). The present land commenced to re-form in 1278 F. (1870-71), and became culturable in 1282 F. (1874-75). This suit has, therefore, been brought against the Government for possession of the land. The cause of action being laid in the last mentioned year.

The Government denies that the land is a portion of the plaintiffs’ Milkeit Ghurghut as laid down in the survey of 1847. The case put forward by Government is, that the Ganges, which in 1847 flowed south of Milik Ghurghut, changed its course in 1861 and intersected the Government estate of Bindra Deara, and the old channel or bed, and the land in suit, came into the possession of Government as part of Bindra Deara, and was surveyed as part of it in 1865. It is admitted that the land again disappeared in 1869 and reappeared in 1876, but it is urged that the land now sued for is identical in site with the land which was held by Government from 1861 to 1869.

The first Court found that 128*b*. 14*c*. 19*d*. out of the land is identical in site with the land surveyed in 1865 as part of the Government estate of Bindra Deara, and found to be in the pos-

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1881 session of the tenants of Government. It also found that the remainder is part of Binda Deara, and is not part of plaintiffs' estate of Milik Ghurghut. The possession held by Government in 1865 is found to have been adverse to the plaintiffs, and their suit declared to be barred by the first Court and also by the lower Appellate Court.

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In this Court it is contended that, taking it as found that the land is identical in site with the land in the possession of Government in 1865, the plaintiffs are entitled to prove that it is part of their estate and re-formed upon its old site, and that their cause of action can only be said to have commenced when the last re-formation commenced.

This contention is entirely unsound, if it is established that the land held by the Government down to 1865-66 is identical in site with the present land. If that land was re-formed on the site of the plaintiffs' estate as it existed in 1847 or earlier, the plaintiffs were undoubtedly the owners of it, and entitled to take possession when it reappeared in 1861 or 1862. This was laid down, as far back as 1848, in the case of *Mussamat Imam Bandi v. Hargovind Ghose* (1), and again in *Roma Nauth Thakoor v. Chunder Narain Chowdhry* (2). *Lopez v. Muddun Mohun Thakoor* (3), decided in 1870, affirmed the law laid down in these cases.

The plaintiffs, therefore, were entitled to take steps to assert their title and to rectify the survey map of 1865, but failed to do so. This neglect is not explained in any way, and we find that the proprietor of Mouza Ghurghut, within which the plaintiffs' milik lands lie, was more alive to his interests, and actually opposed the survey, alleging that the land was part of Mouza Ghurghut. He was defeated in the Revenue Courts, and took no further steps to establish his title.

The plaintiffs now seek, by a suit instituted in 1877, to disturb a possession which commenced in 1862, and continued even after the subsequent submersion in 1866. This, in my opinion, they cannot do. It was contended that the possession which commenced about 1862 did not continue after 1866, and that no

(1) 4 Moore's I. A., 403.

(2) Marshall 136 in 1862.

(3) 13 Moore's I. A., 467.

suit could have been brought during the submergence, which lasted from 1866 to 1876. But if the action of the Government in annexing the land to their estate of Binda Deara, by taking possession and survey, was an invasion of the plaintiffs' title, it did not cease to be so when the land was submerged. On the contrary, the land and the water above the land continued to belong to the estate to which it had been annexed, until this state of things was put an end to by resort to law; and it is the failure of the plaintiffs to put an end to it, either during the possession, or after it had been submerged again, that is fatal to their present case. I do not agree with the argument that a suit would not lie for land submerged in a river. On the contrary, julkar, tulkar, and other rights, not to mention the right to subsequent alluvial re-formation on old sites, are all things which might be asserted in a suit: *The Government v. Baboo Radhoy Singh* (1). For these reasons I would affirm the decision of the lower Courts on the question of limitation.

I understand the plaintiffs now wish for a finding by the lower Appellate Court whether the land in suit is identical with the land held by the Government down to 1866. This was not pressed when the case was before the Division Bench; but the plaintiffs are, strictly speaking, entitled to the finding they ask for. If the lower Appellate Court affirms the finding of the first Court that 128*b*. 14*c*. 19½*d*. are identical with the land held by Government down to 1866, and that the remainder 11*b*. 14*c*. 19½*d*. are part of the estate of Binda Deara, the plaintiffs' suit will be dismissed. I concur in the order proposed by the learned Chief Justice.

Case remanded.

(1) 20 W. R., 117.

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Before Mr. Justice Morris and Mr. Justice Tottenham.

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Feb. 2.

MAHOMED HAMIDULLA KHAN (PLAINTIFF) v. LOTFUL HUQ AND
OTHERS (DEFENDANTS).*

Mahomedan Law—Waqf—Construction of Deed of Endowment—Settlement on Person and his Descendants to three generations, and afterwards to Charity—Appropriations of Property by Settlement.

A Mahomedan settled a portion of his immoveable property as follows:—"I have made waqf of the remaining four annas in favor of my daughter B and her descendants, as also her descendants' descendants' descendants, how low soever, and when they no longer exist, then in favor of the poor and needy." *Held*, this settlement did not create a valid waqf.

To constitute a valid waqf, there must be a dedication of the property solely to the worship of God or to religious or charitable purposes.

Semle.—Appropriations in the nature of a settlement of property on a man and his descendants can only be treated as legitimate appropriations under the designation of waqf, where the term *sadukah* is used.

Even supposing they could be so treated, it would be necessary, in order to validate a waqf by making a settlement of property on himself or his descendants, for a man to reduce himself to a state of absolute poverty.

THE plaintiff was the great grandson, on the mother's side, of one Moulvie Golam Sharuff, who was possessed, among other properties not now in dispute, of an eight-anna share of an estate called Kantabari. By a registered waqfnama dated 1st Bhadro 1248 (15th August 1841), Golam Sharuff made the following settlement of his share of Kantabari, together with some of the other properties:—"I have assigned eight annas of the abovementioned endowed properties for the mosque built by me, and the expenses thereof. Out of the remaining eight annas I have made waqf of four annas in favor of Mussamut Jamila Khatun, *alias* Dhun Bibi, daughter of my daughter, and her descendants, as also her descendants' descendants' descendants, so long as they may continue to have offspring; and when they no longer exist, then in favor of the poor and needy. I have made waqf of the remaining four

* Appeal from Original Decree, No. 152 of 1879, against the decree of Baboo Blubun Chunder Mukerjee, Subordinate Judge of Dinagapore, dated the 23rd January 1879.

annas in favor of my daughter Bibi Budrunnessa and her descendants, as also her descendants' descendants' descendants how low soever; and when they no longer exist, then in favor of the poor and needy After payment of the Government revenue and the collection charges, &c., and after deduction of the mutwalli's towliat right from the proceeds of all the abovementioned endowed properties, the surplus, whatever it may be, shall be divided as follows—*i. e.*, four annas thereof shall be given to Jamila Khatun, *alias* Dhun Bibi, and four annas thereof to Budrunnessa Bibi, inasmuch as four annas share has been endowed in favor of each of the said ladies, &c." Golam Sharuff appointed his wife, Nosima Bibi, as the first mutwalli; on her death, the mutwallis were to be Dhun Bibi and Budrunnessa Bibi, the first defendant, "both of whom will get the towliat right in two equal shares. One of the male descendants of each of these two Mussamuts, so long as such descendants may continue to have offspring, shall be appointed as mutwalli of the endowed properties, and each of the two mutwallis so appointed shall get the towliat right in two equal shares."

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Golam Sharuff died in 1849. After the death of his wife Nosima, and his grand-daughter Dhun Bibi, Budrunnessa and the plaintiff had possession of the property as mutwallis, and administered it for some time under the waqfnama.

Subsequently, Budrunnessa, acting, as the plaintiff alleged, in collusion with her husband, the second defendant, executed a solehnama and mortgage of the entire eight annas shares of the estate Kantabari in favor of Roy Lutchniput Singh, and in execution of a decree against Budrunnessa, obtained on the solehnama and mortgage, that property was put up for sale on 2nd April 1877, and purchased by the other defendants.

The present suit was brought to set aside that sale and recover possession of the property, on the ground, that being waqf or endowed property, it could not be alienated.

The only defence raised, which is material to this report, was, that the property belonged to Budrunnessa in her own absolute right, and was not endowed property.

The Subordinate Judge was of opinion that a waqf was

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created by the document only so far as a moiety of the disputed property was concerned. As to the share left to Dhun Bibi and her descendants, &c., and Budrunnessa and her descendants, &c., he was of opinion, referring to Baillie's Digest of Mahomedan Law, p. 571, that no waqf was created, but that those shares vested absolutely in the mutwallis.

The Subordinate Judge held, that the execution-sale was good as regarded the share which vested absolutely in Budrunnessa, amounting to two out of the eight annas, and therefore the suit was dismissed as to that share. As to the other shares the suit was decreed, four out of the eight annas to be held by the plaintiff and Budrunnessa as mutwallis, and the remaining two annas by the plaintiff alone as absolute proprietor.

The plaintiff appealed from this decision only as regards the share of the property decreed to belong to Budrunnessa absolutely. As to this he contended that it did not vest absolutely in Budrunnessa; that it was waqf property and inalienable; and that the sale of the property was therefore invalid, or at most could only stand good for the lifetime of Budrunnessa.

Baboo *Obhoy Churn Bose* and Baboo *Doorga Mohun Doss* for the appellant.

Baboo *Sreenath Doss*, Baboo *Turucknath Palit*, Baboo *Mohiney Mohun Roy*, and Baboo *Gurudas Banerjee* for the respondents.

The judgment of the Court (MORRIS and TOTTENHAM, JJ.) was delivered by

MORRIS, J.—There is no question that Moulvi Golam Sharuff executed the document styled a “waqfnama,” which bears date 1st Bhadro 1248. The only question raised in this appeal is, whether the four annas, or rather the fourth share of the property which he appropriated under that deed to his daughter Budrunnessa, is, under Mahomedan law, a valid “waqf,” or, in other words, that it is inalienable and incapable of being attached and sold in execution of a decree against Budrunnessa.

The Subordinate Judge, relying upon a passage which is to be found in page 571 of Baillie's Digest of Mahomedan Law, is of opinion, that the "defendant No. 1, Budrunnessa, became absolutely vested in the two annas share out of the eight annas share of Kantabari, and so it became heritable and alienable."

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The passage in question is in these terms:—"If one should say, this my land is a *sadukah* settled on my child, and child of my child, the child of his loins, and the child of his child in existence on the day of the settlement, and those who are born afterwards are included, and the two generations participate in the produce, but none below them are included, nor the children of daughters, according to the Zahir Rewayut; and the *putna* is in accordance with it. And if he should say, 'upon my child, and child of my child, and child of the child of my child, meaning three generations, the produce is to be expended upon his children for ever, so long as there are any descendants, and is not to be applied to the poor,' &c.

The lower Court is of opinion that if a person makes a settlement of his land in favor of his descendants to the third generation, the poor are absolutely excluded from all benefit in the appropriation, and that consequently the property becomes absolutely vested in the descendants of the appropriator. But it seems to us that what was meant in this passage is, that only so long as the descendants survive shall the poor be excluded from the benefit of the appropriation. It becomes necessary, therefore, to consider whether, under Mahomedan law, the settlement which has been made by Moulvie Golam Sharuff is of the nature of a valid waqf. The terms of the deed which bear upon this part of the case are as follows: (*reads portion of waqfnama set out, ante, pp. 744-5.*)

There has been much argument before us as to the real signification of the term "*waqf*." There is no doubt that there is a conflict of authority between Baillie and the other writers on Mahomedan law, Macnaghten and Hamilton, on this subject. But looking to the principal authority, the "*Hidaya*" as read by Abu Hanifa, who was undoubtedly a Sunori, to which sect the family of Golam Sharuff belong, and looking to the doctrines of his disciples, it seems to us that the balance

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of authority is strongly in favor of the view as stated by the Bombay Court in the case of *Abdul Ganne Kasam v. Hussen Miya Rahimtulla* (1)—viz., that “to constitute a valid waqf there must be a dedication of the property solely to the worship of God, or to religious or charitable purposes.” Abu Hanifa, undoubtedly, in 2 *Hidaya*, Hamilton, p. 334, points out that the appropriation, that is waqf, must be to some “charitable” purpose. Now here it is manifest that the appropriation in favor of Budrunnessa is not in the nature of a charity. It is simply in the nature of a settlement upon the daughter—a settlement of property which was to be heritable and to be taken by Budrunnessa’s descendants in certain shares. The words are clear; each daughter is to take four annas, and in the terms of the deed “four annas share has been endowed in favor of each of the said ladies.” If, therefore, the principle underlying a waqf is charity, and if the ultimate applications of property, the subject of “waqf,” must be to objects which never become extinct, and those objects are all of a religious and charitable character, then this particular appropriation fails to answer to this description. Consequently the appropriation of the one-fourth share, which is the subject of this appeal, is invalid, and cannot be held to be “waqf.”

There is, however, some force in the argument which has been addressed to us, that appropriations in the nature of settlement of property upon a man and his descendants have been treated by various exponents of Mahomedan law as legitimate appropriations under the designation of “waqf.” But these settlements are all under Mahomedan law termed *sadukah*, and in the view, apparently, of Baillie, when a settlement of property is made in this way by a man in favor of his descendants, the term *sadukah* must be used.

But we do not gather that this term is employed in the deed of 1st Bhaadro 1248. But further, even admitting that, under Mahomedan law, appropriations or rather settlements of this character can be made, it seems to us clear that the present appropriation falls outside the principle of “waqf.” As explained in the case of *Abdul Ganne Kasam v. Hussen Miya*

Rahimtulla (1), the doctrine of settlement rests entirely upon a saying attributed to the prophet—"a man giving subsistence to himself is giving alms;" but this doctrine only holds good according to Hamilton (2), "where a man appropriates *the whole* of his property, and so reduces himself to poverty; in which case the charity is as effectual with respect to *him* (where he necessarily reserves a sufficiency from the product for his own sustenance) as with respect to *any other pauper*." So that to validate a "waqf" by making a settlement of his property on himself or his descendants, a man must, in the view taken by the prophet, reduce himself to a state of absolute poverty. In the present case it is clear, and it is admitted by the both sides, that there are other properties vested in the appropriator besides those which are the subject of this deed. Consequently, it cannot be said that Budrunnessa has received this property as a pauper. In both points of view, therefore, it seems to us that this appropriation of a one-fourth share, or two annas out of eight annas of Lot Kantabari, cannot be treated as a valid waqf. We, therefore, dismiss the appeal with costs.

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— — — — —
Appeal dismissed.

'Before Mr. Justice Mitter and Mr. Justice Maclean.

UPOOROOP TEWARY AND OTHERS (DEFENDANTS) v. LALLA
BANDHJEE SUIYAY (PLAINTIFF).*

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Feb. 15.

*Hindu Law—Mitakshara—Mortgage of Family Property—Sale of Interest
of one of several Co-sharers in a joint Estate.*

In a suit on a mortgage against a member of a joint Hindu family governed by the Mitakshara law, the whole of the interest of the joint family in the estate was decreed to the mortgagees, who subsequently obtained possession of it. Afterwards a suit was brought by another member of the family, who had attained majority prior to the mortgage, to set it and the decree aside, so far as he was concerned, and to recover possession of his share of the joint family property.

* Appeal from Appellate Decree, No. 2376 of 1879, against the decree of J. F. Stevens, Esq., District Judge of Shahabad, dated the 11th August 1879, modifying the decree of Moulvie Narul Hossein, Subordinate Judge of that district, dated the 30th December 1878.

(1) 10 Bom. H. C. R., 7, at p. 18.

(2) 2 Hidaya, 351, note.

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Held, that the mere circumstance of an antecedent debt was not in itself sufficient to bind him, and that the alienation was not good as against him, unless it could be shown that he had either expressly or impliedly given his consent to the mortgage.

THIS was a suit for recovery of possession of a one-anna share of Mouza Chuck Bias, on the ground that the plaintiff and his father Dabee Pershad, who constituted a joint Hindu family governed by the Mitakshara law, held and owned a two-anna share of the said mouza; and that, in execution of a decree against Dabee Pershad, his interest having been sold and purchased by the defendant, the plaintiff was dispossessed of the property in which he, according to the Mitakshara law, was entitled to a half share. It appeared that the whole two annas of the property in dispute was in the possession of the defendant, in this case, under a zur-i-peshgee executed by Dabee Pershad, and while the whole share was in his possession, on the 24th of August 1864, Dabee Pershad executed a mortgage-bond in favor of one Sreemundle Doss. Dabee Pershad in that bond hypothecated his "proprietary share" in the mouza in dispute. A suit was brought upon that bond by Sreemundle Doss against Dabee Pershad, and a decree was passed on the 7th of June 1865, declaring that the amount decreed should be levied by the sale of the mortgaged property. In the month of February 1866, in execution of that decree, the mortgaged property was sold and purchased by the defendant. Under that purchase it was not disputed that the defendant acquired possession of the whole two annas share. This suit was brought on the 6th August 1878. Intermediately another suit had been brought under the same cause of action, but it was dismissed by the Munsif, in whose Court it was brought, on the ground of want of jurisdiction.

The Subordinate Judge, on the 30th December 1878, holding that the suit was virtually one to compel partition, decreed it, and ordered that the plaintiff be put in possession of a one-anna share in Chuck Bias by proprietary right, but did not give him khas possession, inasmuch as the mortgage lien then existed.

From that decree the defendant appealed to the District Judge, who, on the 11th August 1879, in varying it, declared,

amongst other things, that had the plaintiff claimed it he would have been entitled to the whole two annas share; but inasmuch as he only sued for a one-anna share, the Court decreed that the plaintiff was entitled to obtain proprietary possession only of that, without any adjudication as to the extent of the share to which he was entitled. And it was further declared that the defendants had acquired by the purchase at auction-sale, on the part of their father Ishur Tewari, the share and interest of Dabee Pershad in Mouza Chuck Bias, and was entitled to take such proceedings as they might be advised to have that share and interest ascertained by partition.

The defendants then appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry*, Baboo *Chunder Madhub Ghose*, and Baboo *Aubinash Chunder Banerjee* for the appellants.

Baboo *Doorga Proshad* for the respondent.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J. (who, after stating the facts as above, continued):—Various objections have been taken by the defendants against the plaintiff in this suit, and the lower Courts have overruled them all. Some of them have been also taken before us in this appeal, but it would be convenient to take up first the 8th and 9th grounds mentioned in the petition of appeal. These two grounds raise the question, which is in issue between the parties, as regards the title to the property. It is contended before us, that the decision of the lower Courts, that what was sold was only the interest of Dabee Pershad, is erroneous. The proceedings resulting in the execution-sale taken together with the bond of the year 1864, it is contended, show that what was sold was the entire family property. The District Judge decides this point as follows:—"Now the words which I have just quoted apply exactly to the present case. It appears from the bond of the 24th August 1864, that the mortgage was of Dabee Pershad's right, title, and interest without any specification of share. It appears again from the decree of the 7th June 1865 on that bond that there was no mention of any specific share, but only

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of the right, title, and interest. Finally, the proceeding of the 19th March 1866, confirming the sale, shows clearly that it was only Dabee Pershad's right, title, and interest that passed at the sale to the auction-purchaser." Now it appears to us that the District Judge is not right in the construction which he has put upon the bond of the 24th of August 1864. No doubt, the words used in the bond, by which the hypothecation was effected, were "my proprietary share," but the share specified therein was the share of the family as contra-distinguished from the shares of other coparceners, according to the true principle which governs the relations of members constituting a joint Hindu family under the Mitakshara law. Dabee Pershad, the father, could not predicate of his interest in the joint property as constituting his share. The plaintiff's case is, that at the time of the mortgage the family property was joint. Under these circumstances, it seems to us that the bond, rightly construed, hypothecated the whole share in the disputed mouza which was held by the joint family. In this view of the bond, it would follow that the decree and the sale also referred to the mortgaged property—namely, the share held and owned by the joint family; and if the plaintiff in this case had been a minor at the time of the mortgage, the suit against the father would, in accordance with numerous decisions, have been held as brought against him in his representative character representing the joint family. But in this case the plaintiff had attained majority before the mortgage of the 24th August 1864 was executed, and therefore the answer to the question, whether or not the plaintiff is bound by the mortgage and the subsequent decree, would depend upon the enquiry into certain questions of fact which I shall indicate hereafter, but upon which questions of fact there has been no decision by the lower Appellate Court. The law upon this subject is contained in paras. 28 and 29, Chap. I, sec. 1 of the Mitakshara. The author of the Mitakshara, treating of the power of alienation of a single member of a joint family, says in para. 28: "An exception to it follows. Even a single individual may conclude a donation, mortgage or sale of immoveable property during a season of distress for the sake of the family, and especially for pious purposes;" and in

para. 29 he goes on to say: "The meaning of that text is this—while the sons and grandsons are minors and incapable of giving their consent to a gift and the like, or while brothers are so and continue unseparated, even one person who is capable may conclude a gift by hypothecation or sale of immoveable property if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable." From those two paragraphs it is clear, that where the coparceners are all adults, the sale by one of them would not be valid unless made with the consent of the rest; but if some of them are minors, the members who are adults may make a valid alienation of the family property under the conditions mentioned in para. 29. It has been held by the Judicial Committee of the Privy Council, that it is a pious duty for a son under the Mitakshara law to pay such debts of his father as were not contracted for immoral purposes; and according to the Hindu law, it is also a pious duty for a person to pay off his own debts. It has been held by their Lordships of the Judicial Committee, that from these two propositions it follows, that an alienation by a father living jointly with his sons under the Mitakshara law to pay off his antecedent debts, which debts are not proved to have been incurred for immoral purposes, is an alienation for the performance of indispensable duties within the meaning of para. 29, Chap. I, Sec. I of the Mitakshara. In this case, therefore, if the alienation—namely, the mortgage of the 24th August 1864—had been made for the purpose of paying off an antecedent debt, and if the plaintiff had been then a minor, the mortgage would have been binding upon him; but it appears that the plaintiff at that time was of age, and therefore, as already pointed out, the mere circumstance of the existence of an antecedent debt would not be sufficient to bind him. But it must be proved that he was a consenting party to that transaction. His consent might have been express or implied. If he stood by, and thereby allowed the creditor with whom his father was dealing to believe that he was a consenting party, the transaction would be binding upon him. This question was raised in the following issue, "whether or not the bond, the

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decree, and the auction-sale were executed, passed, and held with the knowledge of the plaintiff; if so, would that operate as an estoppel against the plaintiff?" If all these proceedings were held with the knowledge of the plaintiff, it seems to us that it would be a fair inference from that circumstance that the plaintiff was a consenting party to the original transaction. The circumstance that, under the purchase in the year 1866, the defendants obtained possession of the whole family property, and remained in possession of it for about twelve years, has also a material bearing upon this question. As it is a question of fact, we cannot, in this second appeal, deal with it. We must, therefore, remit the record to the lower Court in order that it may, with reference to the observations made above and the evidence upon the record, come to a finding upon it.

We reserve at present our opinion upon the other questions raised in this appeal, and the appeal will be finally disposed of as soon as the record and the finding of the lower Court come up.

We reserve the question of the costs of this hearing.

Case remanded.

Before Mr. Justice McDonell and Mr. Justice Field.

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 Feb. 1.

ANNODA PERSAD ROY (PLAINTIFF) v. DWARKANATH GANGO-PADHYA AND ANOTHER (DEFENDANTS).*

Principal and Agent—Duty of Agent to account—Procedure on taking Accounts in Mofussil—Pleading in Suit for Account—Access to Books and Papers—Civil Procedure Code (Act X of 1877), ss. 394, 395.

In a suit for an account against an agent, the plaintiff stated that the defendant had not submitted proper accounts of his agency, and prayed that the defendant might be ordered to produce certain papers, and that, on failure to submit the accounts, he might be decreed to pay the plaintiff Rs. 1,200 by way of damages. The plaintiff also alleged that, in consequence of the defendant's negligence and mismanagement, the plaintiff believed that he had sustained a loss of Rs. 5,000, and prayed for a decree for this sum.

* Appeal from Original Decree, No. 333 of 1879, against the decree of A. J. R. Bainbridge, Esq., Judge of Moorsshedabad, dated the 13th October 1879.

Held, that no decree could be made for the sums mentioned, or any other sum, until an account had been taken and the amount due from the defendant ascertained.

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Per FIELD, J.—It is the duty of an agent to render proper accounts to his employer irrespective of any contract to that effect. And he does not discharge that duty by merely delivering to his employer a set of written accounts without attending to explain them, and produce the vouchers by which the items of disbursements are supported.

Method to be followed on taking accounts in the *mofussil* stated.

If the taking of accounts by the Judge would occasion a waste of public time, he should resort to the provisions of ss. 394 and 395 of the Civil Procedure Code; and furnish the commissioner with such part of the proceedings and such detailed instructions as may appear necessary.

In order to enable an agent to prepare accounts to be furnished to his principal, he should be allowed to have reasonable access, at proper times and in the presence of responsible persons, to such books and papers in the principal's possession as may be necessary for the preparation of the accounts.

BABOO Annoda Pershad Banerjee and Baboo Hem Chunder Banerjee for the appellant.

Baboo Rashbehary Ghose, Baboo Hurry Mohun Chuckerbutty, and Baboo Kuruna Sindhu Mookerjee for the respondents.

The facts of this case sufficiently appear from the judgment of the Court (McDONELL and FIELD, JJ.), which was delivered by .

FIELD, J. — We think that the decree of the District Judge in this case cannot be sustained. It is quite possible that the plaintiff has not properly conceived, or correctly stated in his plaint, the exact remedy to which he is entitled; but we think, having regard to the whole of the circumstances of the case, and the inexact practice prevalent in the *mofussil* in this class of cases, that the plaintiff ought not to be denied any remedy whatever. In his plaint he states (and on this point there is no dispute) that the defendant was in his employment from September 1875 to May 1879. He states further, that the defendant has not submitted to him proper accounts of his agency; and in the 9th para. he asks that a decree be passed to the effect, that the defendant No. 1 do submit the *nikas* papers called for agreeably to the provi-

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sions of the kabuliat executed by him. The plaint then goes on to ask that, on failure to submit the said accounts, the defendant may be decreed to pay him Rs. 1,200 by way of damages. It is further alleged that, in consequence of the defendant's negligence and mismanagement, he (the plaintiff) believes that he has sustained a loss of Rs. 5,000, and he asks that a decree may be passed in his favor for this sum, or in respect of such sum as will represent the loss which may be found by the Court to have been sustained by him.

Now some of these prayers have been wrongly conceived. There can be no decree for Rs. 1,200 or Rs. 5,000, or any other sum, until, upon taking the accounts, it has been ascertained that the plaintiff is entitled to receive a sum of money from the defendant, and until it has been further ascertained what the amount is to which the plaintiff is so entitled. That it is the duty of the defendant to render proper accounts to his employer, and this irrespective of the stipulations contained in the kabuliat, there can be no doubt. Mr. Story, in para. 203 of his work on Agency, says, that "it is the duty of an agent, where the business in which he is employed admits of it or requires it, to keep regular accounts of all his transactions on behalf of his principal, not only of his payments and disbursements, but also of his receipts, and to render such accounts to his principal at all reasonable times without any suppression, concealment, or overcharge." See also Story's Equity Jurisprudence, §§ 462, 463. We may add, that an agent does not discharge the duty of accounting, by merely delivering to his employer a set of written accounts, without attending to explain them, and produce the vouchers by which the items of disbursements are supported.

In the written statement, which was filed by the defendant in this case, he alleged (para. 12) that the *nikas* papers required by the plaintiff had been prepared and submitted to him; and in other parts of the same written statement, he further alleged, that certain other accounts had been required from him within such a time, and in such a form, as rendered it impossible for him to comply with this requisition of his employer.

We think that, having regard to these allegations, the proper

points for enquiry in this case were: *first*, did the defendant render to the plaintiff such reasonable and proper accounts of his agency as the plaintiff was entitled to require from him? and *secondly*, did the defendant further explain these accounts and support them by the production of proper vouchers? We may observe, that the defendant does not allege that his accounts have been settled, or that the plaintiff has expressly or by acquiescence, accepted the accounts submitted by him. If sufficient accounts have been rendered, but not explained and supported in the manner above pointed out, the defendant must be called upon to explain and support them. If sufficient accounts have been rendered, explained, and supported, or, in the latter case, as soon as the accounts rendered have been explained and supported, it will then lie upon the plaintiff to point out the entries in those accounts which he alleges to be erroneous; or, in respect of transactions not shown in the accounts, to state what monies have been received and not credited. The Judge must then proceed to deal with the questions thus raised between the parties, treating each item separately.

If, on the other hand, no sufficient accounts have been rendered by the defendant, the proper course then for the Court is, that pointed out in a judgment of Phear, J., in the case of *Synd Shah Maiahmad, alias Boolaki Al v. Mussamut Bibee Nusi-bun* (1). Phear, J., there says:—"The proper and convenient mode of doing so is to fix a day before which the defendant should file a written statement of his account, exhibiting therein all the items of receipt for which he is accountable on one side and all items of disbursements on the other; and to fix another day before which the plaintiff should file any objections, which he may have to make to these accounts when filed; and finally, the Judge ought to appoint a third day upon which an inquiry into the truth and correctness of the statements of account filed by the defendant should be made; and on that enquiry he will take all such evidence, in the way of books and vouchers, and so on, as the defendant is entitled to produce, as well as the testimony of necessary witnesses, and also all evidence on the part of the plaintiff tending to invalidate the accounts or

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to surcharge them; and eventually, upon the termination of the enquiry, the Judge should satisfy himself as to the amount which is due upon the account as established by the evidence of both parties, and frame his decree accordingly. He ought not to give a decree for alternative damages founded upon any antecedently estimated amount, which must, apart from the evidence, be simply a matter of conjecture or of claim. He should give no decree other than an order on the defendant to file his accounts, before the accounts have been taken, and then confine his decree to such amount as he may find to be due upon the proper taking of the accounts against the defendant. If the defendant prove contumacious with regard to filing his statement of accounts, the Judge may proceed with the taking of the accounts against him on the footing of evidence furnished by the plaintiff, and in so doing he may make all reasonable presumptions against the defendant." See also the directions to be found at page 12 of the Memorandum of Practice prefixed to the edition of the Circular Orders published in 1876. There may be cases (and it is possible that this present case may be one) in which the taking of any account in the manner above pointed out, may occasion so great a waste of public time of the Judge, that resort may well be had to the provisions of the Code of Civil Procedure contained in s. 394. If it be found advisable to have recourse to these provisions, the Judge should then follow the directions contained in s. 395, and furnish the commissioner with such part of the proceedings and such detailed instructions as appear necessary. We think that if these directions be carried out, there will be no greater difficulty in taking accounts in the mofussil than is experienced on the Original Side of this Court, or in any other Court in which accounts have to be taken and settled between parties as disputations as the parties in the present case.

We think it desirable to add, that, in order to enable the defendant to prepare such accounts as the plaintiff is entitled to receive from him, the defendant ought to have reasonable access, at proper times and in the presence of responsible persons, to such books and papers in the plaintiff's sherista as may be necessary for the preparation of the accounts.

The case will be remanded to the District Judge in order that he may proceed in accordance with the above directions. All costs in the case will follow the ultimate result.

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Case remanded.

Before Mr. Justice McDonell and Mr. Justice Field.

NOBIN CHUNDER SIRCAR AND ANOTHER (DEFENDANTS) v. GOUR
CHUNDER SHAIJA AND ANOTHER (PLAINTIFFS).*

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Feb. 15.

*Assessment of Rent—Enhancement—Decree for Rent at Enhanced Rate—
Beng. Act VIII of 1869.*

On the 25th of January 1864, the plaintiffs obtained a decree against the defendants for assessment of enhanced rent. Shortly afterwards, the defendants executed a kabuliati, at a reduced rate, for eleven years ending the 31st Assin 1282 (16th October 1875). After the term had expired, the plaintiffs sought to recover rent from the defendants at the rate settled by the decree of 1864.

Held, that the decree had been superseded by the subsequent arrangement, and that the plaintiffs could not recover rent at an enhanced rate, except under the provisions of Beng. Act VIII of 1869.

IN this case it appeared that, in 1863, Messrs. Hill & Co. brought a suit against the defendants for assessment of rent, and obtained a decree on the 25th of January 1864, by which the jama was fixed at Rs. 139-3-7. Shortly afterwards, on the 1st of Kartick 1271 (16th October 1864), the defendants executed a kabuliati in respect of the lands covered by the decree, by which they agreed to pay a rent of Rs. 26-6 per annum and to grow indigo for Messrs. Hill & Co., and that in case the defendants should make default in the payment of the rent or in the growing of the indigo, then the whole jama fixed by the decree of the 25th January 1864 should become due and payable by the defendants. The kabuliati was for a term of eleven years, which expired on the 31st Assin 1282 (16th October 1875).

* Appeal from Appellate Decree, No. 2289 of 1879, against the decree of Baboo Krishna Chunder Chatterjee, Officiating Subordinate Judge of Nuddea, dated the 27th June 1879, affirming the decree of Baboo Shushee Bhusan Banerjee, Munsif of Chooa Janga, dated the 31st January 1878.

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In the month of Pous 1282 (December 1875, January 1876), the plaintiffs, who are the assignees of Messrs. Hill & Co., served a notice on the defendants to the effect that, in future, the rent should be that fixed in the decree of the 25th January 1864.

The main contention of the defendants was, that the arrangement under the kabuliāt superseded the decree; and also that the right under the decree had become extinct, as no rent had been realized under it for upwards of twelve years. The Court of first instance, citing *Doorga Churn Chatterjee v. Doyamoyee Dossia* (1), held, that the enhancement decree had not become ineffectual, but had merely remained in abeyance, and decided in favor of the plaintiffs. This decision was upheld on appeal. The defendants then appealed to the High Court.

Baboo *Bhowany Churn Dutt* for the appellants.

Baboo *Mohiny Mohun Roy* for the respondents.

The judgment of the Court (McDONELL and FIELD, JJ.) was delivered by

McDONELL, J. (who, after stating the facts, continued).—Now it appears to us that the plaintiffs are not entitled to succeed in this suit. It may be well to point out in the first instance that the case of the plaintiffs is, not that the defendants, holding over after the expiry of the term of the kabuliāt, are bound by the conditions of the kabuliāt, and are, therefore, liable to pay rent according to the terms of that instrument, nor is it contended that the defendants have refused to grow indigo, and are, therefore, liable, under the penalty-clause, to pay the rent fixed by the decree. As a matter of fact, the plaintiffs do not seek to enforce the conditions of the kabuliāt in any way. Their contention is, that, on the expiry of the term of the kabuliāt, the enhancement decree of 1864 revived, and has full effect.

In the first place, it is to be observed that this decree does not contain any direction as to the time for which it is to have effect. Those who are conversant with the history of the law of enhancement of rent in this Presidency, are well aware that

there has been some discussion and difference of opinion as to the length of time for which the Courts have authority to fix enhanced rent.

Then, in the next place, the parties did not, when executing the kabuliat, make any stipulation to the effect that, upon the expiry of the term of the kabuliat, the enhancement decree should survive and have effect. It would no doubt have been competent to the parties to have provided in this manner for what was to take place on the expiry of the term of the kabuliat, but they did not do so; they did not provide for the contingency by their own contract, and we have, therefore, to see how the position of the parties is affected by the law of landlord and tenant.

It appears to us, that the arrangement embodied in the kabuliat had the effect of superseding the enhancement decree; and that, upon the expiry of the term of the kabuliat, if the plaintiffs seek to enhance the rent, they must do so by having recourse to the procedure laid down by Beng. Act VIII of 1869.

The notice served by the plaintiffs upon the defendants, is, admittedly, not such a notice of enhancement as is required by the provisions of this Act. It is merely a notice calling upon them to pay the rent decreed in 1864. Then, having regard to the provisions of s. 5 of the Act, in cases of dispute between the parties, the rent previously paid by the ryot is to be deemed fair and equitable, unless the contrary be shown by either party in a suit under the Act. Now the rent previously paid in this case is the rent payable under the kabuliat; and we think, that if the plaintiffs seek to recover a higher rent than that so previously paid, they must proceed under the enhancement provisions of Beng. Act VIII of 1869.

The appeal will, therefore, be decreed with costs of both Courts.

Appeal allowed.

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APPELLATE CRIMINAL.

Before Mr. Justice Cunningham and Mr. Justice Maclean.

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Feb. 22.

IN THE MATTER OF THE PETITION OF MAYADEB GOSSAMI.*

THE EMPRESS v. MAYADEB GOSSAMI.

False Evidence in Judicial Proceeding—Deposition of the Accused when admissible as Evidence—Civil Procedure Code (Act X of 1877), ss. 178, 182, 183, § 647—Evidence Act (I of 1872), s. 91.

Failure to comply with the provisions of ss. 182 and 183 of Act X of 1877 (Civil Procedure Code) in a judicial proceeding, is an informality which renders the deposition of an accused inadmissible in evidence on a charge of giving false evidence based on such deposition; and under s. 91 of Act I of 1872 (Indian Evidence Act), no other evidence of such deposition is admissible.

Baboo *Baikant Nath Dass* for the appellant.

No one appeared on behalf of the Crown.

The facts of this appeal sufficiently appear in the judgment of the Court (CUNNINGHAM and MACLEAN, JJ.), which was delivered by

CUNNINGHAM, J.—The prisoner in this case applied for a certificate under Act XL of 1858 in respect of the estate of two infants, and in support of his application he gave a sworn deposition on the 4th October last before the District Judge.

His deposition was made in Assamese, and was translated by the Sherishtadar of the Court, and the Judge recorded it in English. He did not sign it, nor was it read over to the witness or translated? The requirements of ss. 182 and 183 of the Civil Procedure Code were, therefore, not complied with. This is clear from the deposition of the Sheristadar before the Deputy Commissioner.

* Criminal Appeal, No. 66A of 1881, against the order of A. Porteous, Esq., Assistant Commissioner of Kamrup, dated the 27th December 1880.

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At the conclusion of the proceedings in his Court, the Judge considered that the prisoner had given false evidence, and he directed that he should be prosecuted. This has resulted in his conviction, and as this Court was of opinion, on the facts brought to its notice, that the appeal ought not to be tried by the Judge before whom the false evidence was given, the appeal has been called up to this Court.

It is contended for the defence, that the informalities which took place in recording the accused's deposition render the record of his evidence inadmissible; and that, under s. 91 of the Evidence Act, no other evidence of his deposition is admissible.

We consider this contention sound. By s. 647 of the Civil Procedure Code, the procedure prescribed by the Code is to be followed, as far as it can be made applicable, in all proceedings, in any Court, other than suits and appeals. By s. 178 a party to a suit required to give evidence is governed by the rules as to witnesses. Sections 182 and 183, therefore, applied to the accused's deposition, and those sections not having been complied with, the record is inadmissible.

The conviction must, therefore, be quashed, and the prisoner released.

The record of the proceedings before the District Judge does not show that the Sheristadar was sworn or affirmed as required by Act X, 1873, s. 5 (b). The Judge's attention should be drawn to this, and a copy of this judgment furnished to him from this Court.

Conviction quashed.

PRIVY COUNCIL.

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Nor. 19.

RANI ANAND KUNWAR AND ANOTHER (DEFENDANTS) v. THE COURT OF WARDS, ON BEHALF OF CHANDRA SHEKHAR, A MINOR (PLAINTIFF).

[On appeal from the Court of the Commissioner of Sitapore in Oudh.]

Hindu Law—Adoption by Widow—Contingent Reversionary Heir—Collusion—Party to suit to contest Adoption.

Although a suit, to contest an adoption made by a Hindu widow of a son to her deceased husband, may be brought by a contingent reversionary heir, yet it is not the law that any one who may have a possibility of succeeding to the estate of inheritance held by the widow for her life is competent to bring such a suit. The right to sue must be limited. As a general rule, the suit must be brought by the presumptive reversionary heir,—that is to say, by the person who would succeed to the estate if the widow were to die at the time of the suit. But it may be brought by a more distant heir, if those nearer in the line of succession are in collusion with the widow, or have precluded themselves from interfering. The rule laid down in *Bhikaji Apaji v. Jagannath Vithal* (1) approved. Reference made to *Koor Goolab Sing v. Rao Kurun Sing* (2).

If the nearest heir had refused, without sufficient cause, to institute proceedings, or if he had precluded himself by his own act or conduct from suing, or had colluded with the widow, or had concurred in the act alleged to be wrongful, the next presumable heir would be, in respect of his interest, competent to sue. In such a case, upon a plaint stating the circumstances under which the more distant heir claimed to sue, a Court would exercise a judicial discretion in determining whether he was or was not competent, in that respect, to sue; and whether it was requisite or not, that any nearer heir should be made a party to the suit.

In a suit to have an alleged adoption set aside, the plaintiff, a minor, through his guardian, claimed to sue, on the strength of being the adopted son of the husband of a daughter of a brother of the father of the deceased under whose authority the adoption was alleged to have been made by the widow, the defendant. The Judicial Committee, without deciding that, as an adopted son, this minor had the same rights as a naturally born son, and without deciding that he would have been entitled, in default of nearer relations, to succeed to the estate of inheritance, after the death of the widow, pointed out, that he

* *Present*:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

(1) 10 Bom. H. C. Rep., A. C. J., 351.

(2) 14 Moore's I. A., 187.

could only have succeeded as a distant bandhu, and that he had not a vested but at most a contingent interest. And *held*, that there being, in fact, heirs nearer in the line of succession than this minor, the grounds of his competence to sue in respect of his interest, assuming that interest to exist, should have been made out in the manner above indicated.

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APPEAL from a decree of the Court of the Commissioner of the Sitapore Division of Oudh (15th June 1877), affirming a decree of the Deputy Commissioner of the District of Bara Banki (28th August 1870).

The question raised in this appeal was, whether the respondent Chandra Shekhar, a minor suing by his guardian, was in such a position as heir, that he could claim the setting aside of an adoption, alleged to have been made by the first appellant, the Rani Anand Kunwar, as widow of Shunkersahai, deceased, of the second appellant, Radakishen.

The disputed adoption was said to have been made in 1851, under the written authority of Shunkersahai, who had died in 1841. After his death, the first appellant became [and after a suit was declared—see *Widow of Shunkersahai v. Rajah Kashipershad* (1)] entitled to the rights of an under-proprietor in certain villages, forming part of the taluqua of Sessendi, for a widow's estate.

The minor, Chandra Shekhar, was the adopted son of the last taluqdar of Sessendi, Raja Kashipershad, whose wife, Mussamut Ummed Koer, was Shunkersahai's paternal uncle's daughter. On the death of Kashipershad, the minor's estate had come under the Court of Wards, of which the Superintendent, suing on behalf of the minor, had obtained a decree in the Court of the Deputy Commissioner of Bara Banki, to the effect that neither the adoption of Radakishen, nor the authority to make it, had been proved.

This decree was confirmed on appeal by the Court of the Commissioner of Lucknow; who however held, that the minor plaintiff, not being related to Shankarsahai in any degree that could be understood to come within the table of succession in the Mitakshara, had not a reversionary interest sufficient to enable him to maintain this suit. But that as taluqdar of Sessendi, the minor could maintain the suit, because (said the Commissioner)

1880 "a taluqdar had a reversionary interest in every under-proprietary tenure in his estate."

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The facts of the case are stated in their Lordships' judgment.

Mr. J. F. Leith, Q. C., and Mr. R. V. Doyne appeared for the appellants.

Mr. T. H. Cowie, Q. C., and Mr. J. D. Mayne for the respondent.

An objection was taken on behalf of the respondent, having reference to the effect given to the concurrent findings of a Court of first instance and an Appellate Court on matters of fact. This was disallowed in regard to the nature of the questions raised; see reference to the usual course made in the judgments in *Pauliem Valoo Chetty v. Pauliem Sooryah Chetty* (1) and in *Goshain Tota Ram v. Raja Rickmunee Bullub* (2).

It was then argued for the appellants,—*first*, that the interest of the minor Chandra Shekhar, in the estate held by the widow, was too remote to afford a legal basis for his suing through his guardian to contest the alleged adoption. In fact, other heirs were entitled, in priority to him, to interests in the estate of inheritance contingent upon their surviving the widow. The lower Appellate Court had rightly held that this minor had no such reversionary interest, as a bandhu, as would support this suit; but had erred in holding that as taluqdar of Sessendi he had a sufficient interest for this purpose. *Secondly*, the minor, as the adopted son of Raja Kashipershad, was not entitled to succeed through the Raja's wife, his adoptive mother Ummed Koer, to her collateral relation, Shunkersahai. He was not so entitled, because there was authority for holding that adopted sons did not succeed *ex parte materna* to collaterals. On this point were cited Macnaughten's Hindu Law, ch. 6, page 78 of 3rd edition; *Gunga Mya v. Kishen Kishore* (3); *Morun Moe Debeah v. Bejoy Kishto* (4); *Chinnara Makristna Aiyar v. Minatchi* (5); Table of Succession, Vivada Chintamani, translated by Prosono Kumar Tagore.

(1) I. L. R., 1 Mad., 285; S. C., (3) 3 Sel. Rep., 128; N. S., 170. L. R., 4 Ind. App., 114.

(4) W. R., Sp. No., 1864, p. 121.

(2) 13 Moore's I. A., 82.

(5) 7 Mad. H. C. Rep., 245.

For the respondent it was argued that the minor's interest in the estate of inheritance was sufficient to support this suit for its protection against the act of the widow. Where the immediate heir was not in a position to sue, a more remote heir was allowed to contest the acts of the widow in *Bal Gobind Ram v. Hirusranee* (1), in which case the judgment referred to the suit of a distant heir permitted in *Chunder Koomar Hazaree v. Dwarkanath Purdhan* and others (2). Where nearer heirs had concurred in the acts of the widow, the more distant were held entitled to sue: see *Kooer Goolab Sing v. Rao Kurun Sing* (3). In the present case nearer heirs might have precluded themselves from suing, and had not interfered. So that, on the principles explained by Sir Lawrence Peel in *Oojulmoney Dossee v. Sagormoney Dossee* (4), and *Hurrydoss Dutt v. Rungunmoney Dossee* (5), with regard to the nature of the estate taken by the widow, the minor in this instance could come in for the protection of the inheritance. Reference was also made to *Bhikaji Apaji v. Jagannath Vithal* (6).

On the second part of the argument, *viz.*, whether the adopted son could succeed *ex parte materna*, and was or was not in the position of a distant bandhu in the family of his adoptive mother, it was pointed out that the course of decision in the Indian Courts had changed since the year 1821, when *Gunga Miya's* case (7), was decided.

In 1859, the ruling was, that the adopted son succeeded in his adoptive mother's family, see *Teencowree Chatterjee v. Dinonath Banerjee* (8); and more recently this had been held in the North-Western Provinces—*Sham Kuar v. Gaya Din* (9). This adopted son would be in the position of a distant bandhu; and the Mitakshara list of bandhus, as decided in *Girdhari Lal Roy v. The Government of Bengal* (10) was illustrative, not exhaustive.

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(1) 2 W. R., Civ. Rul., 255.

(2) S. D. A., 1859, p. 1623.

(3) 14 Moore's I. A., 187.

(4) 1 Tay. and Bell, 370.

(5) 2 Tay. and Bell, 279.

(6) 10 Bom. H. C. Rep., A. C. J., 351.

(7) 3 Sel. Rep., 128; N. S., 170.

(8) 3 W. R., 49.

(9) I. L. R., 1 All., 255.

(10) 1 B. L. R., 44.

1880 The principles referred in the judgment of Mitter, J., in
 RANI ANAND *Guru Gobind Shaha Mandal v. Anandlal Ghose Mazumdar* (1)
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Reference was made to Menu's Institutes, ch. ix, para. 183; Dattaka Mimansa, ch. ii, para. 69, ch. vi, paras. 40 and 52; Dattaka Chandrika, ch. i, paras. 23, 76, ch. iii, paras. 16, 17; Mitakshara, ch. i, s. 2, paras. 30 and 31; Sutherland's 'Synopsis, 668; Macnaghten's Hindu Law, Vol. I, ch. vi, Vol. II, 88; Stokes's Hindu Law Books, 420; and Mayne's Hindu Law and Usage, para. 149.

In reply it was insisted that the nearer heirs had not been shown to be precluded from suing. It was also argued, that the existence of the adopted son's right to succeed *ex parte materna* would not accord with the general principle that the wife, on marriage, left her own gotra and entered that of her husband. The verses in the Dattaka Mimansa and Chandrika, cited on this point, were vague.

Their Lordships' judgment having been (November 19th) reserved, was delivered by

SIR R. P. COLLIER.—The suit out of which this appeal arises was instituted in the Court of the Deputy Commissioner of Lucknow, in the Province of Oudh, by the respondent, the Superintendent of the Court of Wards, on behalf of Raja Chandra Shekhar, a minor, against Rani Anand Kunwar and Radakishen, the appellants, to set aside an adoption set up by them, by which, as they alleged, the first defendant had adopted the second defendant as the son of her deceased husband, Shunkersahai.

The suit was transferred to the Court of the Deputy Commissioner of Bara Banki in the district of Sitapore.

The minor on whose behalf the suit was instituted is the taluqdar of Sessendi, the taluq having descended to him as the adopted son of Raja Kashipershad, the former taluqdar.

By an order of Her Majesty in Council made in the year 1873, in pursuance of a report of the Judicial Committee in an appeal in which the first defendant was appellant and the

aforesaid Raja Kashipershad was respondent, the first defendant was declared to be entitled, as the widow and heiress of the aforesaid Shunkersahai, to a Hindu widow's estate of inheritance, in four of the mouzas, and to a one-third share of the profits of seven others of the mouzas comprised within the said taluq of Sessendi, and to a sub-settlement of the said four mouzas (*see* the case of the *Widow of Shunkersahai v. Rajah Kashipershad* (1)).

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The plaint in the present suit, which was filed on the 8th July 1875, stated, that the suit was brought to set aside the so-called adoption of the second defendant, and also to set aside a decree given under s. 15, Act VIII of 1859, declaratory of the so-called adoption, obtained by the defendants by fraud and collusion. It alleged, that the said Raja Chandra Shekhar was taluqdar of Sessendi; that, at the time of the said decree, the defendant No. 1 was a sub-proprietor of the said taluq, and liable to him for the Government revenue demand plus a certain percentage; and that the effect of the so-called adoption and decree, so long as they were not set aside, was to put the so-called adopted son of the first defendant in her place as sub-proprietor, and thus to thrust upon the taluqdar, in a method contrary to law, an obnoxious sub-proprietor.

The plaint further stated, that the said Raja Chandra Shekhar was entitled, in reversion, to the sub-proprietary estate so held by the defendant No. 1, and that the effect of the so-called adoption and of the decree declaratory of it, was illegally to injure and postpone that reversion; that the said Raja Chandra Shekhar was further entitled, immediately in reversion, to the sub-proprietary estate so held by the defendant No. 1 as aforesaid, by right of purchase under a deed of sale bearing date 7th day of November 1862, and that the effect of the so-called adoption and of the decree declaratory of it, was illegally to injure and postpone that reversion.

The first defendant filed a written statement, in which she set up the adoption as having been made in 1851 in pursuance of the verbal and written authority of her deceased husband. She also set out a genealogical tree of the family, which both

1880 parties admitted to be correct so far as it goes, and of which
 RANI ANAND the following is a copy :—
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Imrit Lall Pathuk.

Koondun Lall.

Mohun Lall.

Sitaram.*

Shunkersahai,
 married to
 Mussamut Anund
 Koer.

Mussamut Ummed
 Koer, married
 to Raja
 Kashipershad.

* Had three
 daughters,
 who have
 sons, all
 alive now.

Radakishen,
 adopted son of
 Shunkersahai.

Chandra Shekhar,
 adopted by Raja
 Kashipershad.

Adjndhia
 Pershad,
 alive.

Luchman
 Pershad,
 alive.

Rughunath
 Pershad,
 dead.

Beni Madho,
 alive.

Sheo Rutton,
 alive.

Ram Rutton,
 alive.

She further stated, that the plaintiff had no *locus standi*, nor had the Superintendent of the Court of Wards any right to institute the suit.

Further, she alleged that the plaintiff had no right to sue, because he was only her husband's uncle's daughter's son, and during the lifetime of her husband's male cousins (the sons of Sitaram Pathak) and their sons (to wit, Sheo Rutton and Ram Rutton), and the possibility of an adoption of a son being made by any of them, the plaintiff could not, by any means, be considered the nearest reversioner to her or to her husband.

The Deputy Commissioner held, that the plaintiff was not

the immediate reversioner, either by right of his being the taluqdar or by inheritance; but that he was a remote reversionary heir, and was kept out of his rights by virtue of the alleged adoption and declaratory decree, and that he had thereby sustained sufficient injury to entitle him to maintain the suit. Accordingly he made a decree* that the alleged adoption and the decreè declaratory of it be set aside so far as the plaintiff was concerned.

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Upon appeal the Commissioner affirmed the decree of the Deputy Commissioner, but on a different ground. He agreed with the Deputy Commissioner that the plaintiff had not proved the alleged deed of purchase of the 7th November 1862, upon which he relied; he held that the plaintiff was not a reversionary heir of Shunkersahai, but considered that, as taluqdar, he had a reversionary interest in the sub-proprietary estate, which entitled him to maintain the suit.

Their Lordships are of opinion that the first ground upon which reliance was placed on behalf of the plaintiff, and upon which the Commissioner decided in his favour,—viz., that as taluqdar he had a right to have the alleged adoption and declaratory decree set aside as against him,—is wholly untenable. Indeed, the learned counsel for the respondent, was obliged to abandon it. The last of the three grounds upon which the plaintiff relied in his plaint,—viz., that he was entitled, by purchase, to the immediate reversion in the said sub-proprietary estate,—fails in fact, inasmuch as both the lower Courts concurred in finding that the alleged deed of sale of the 7th November 1862 was not proved.

The only remaining question then is—Is the minor a reversionary heir of Raja Kashipershad; and if so, is he entitled to maintain the suit?

It appears from the genealogical table above set out, and it is not disputed, that the minor is the adopted son of Raja Kashipershad, who was the husband of Ummed Koer, the daughter of Mohun Lall, who was a brother of Koondun Lall, the father of Shunkersahai. It is unnecessary to determine whether he could, under any circumstances, succeed by inheritance to the property of Shunkersahai; and their Lordships

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abstain from expressing any opinion upon that point. Admitting, however, for the sake of argument, and only for the sake of argument, that, as an adopted son, he had the same rights as a naturally-born son, and that, as a naturally-born son of Ummed Koer, he would have been entitled, in default of nearer relations, to succeed by inheritance to the property of Shunkersahai, it could only have been in the character of a distant bandhu. It is clear that a son of a daughter of a father's brother is much farther removed in the order of succession than a son of a father's brother, or a son of such a son. In any view of the case, the minor had not a vested, but at most a contingent, interest in the property of Shankarsahai during the lifetime of his widow; see *Hurrydoss Dutt v. Rungunmoney Dossee* (1).

The question then arises, is the contingent reversionary interest which the minor has, if he has any, sufficient to enable him to maintain the action which is brought to impeach the adoption of the second defendant?

Their Lordships are of opinion that although a suit of this nature may be brought by a contingent reversionary heir, yet that, as a general rule, it must be brought by the presumptive reversionary heir,—that is to say, by the person who would succeed if the widow were to die at that moment. They are also of opinion that such a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow, or have precluded themselves from interfering. They consider that the rule laid down in *Bhikaji Apaji v. Jagannath Vithal* (2) is correct. It cannot be the law that any one who may have a possibility of succeeding on the death of the widow can maintain a suit of the present nature, for, if so, the right to sue would belong to every one in the line of succession, however remote. The right to sue must, in their Lordships' opinion, be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would

(1) 2 Tay. and Bell, 279.

(2) 10 Bom. H. C. Rep., A. C. J., 351.

be entitled to sue; see *Koor Goolab Sing v. Rao Kurun Sing* (1). In such a case, upon a plaint stating the circumstances under which the more distant reversionary heir claims to sue, the Court must exercise a judicial discretion in determining whether the remote reversioner is entitled to sue, and would probably require the nearer reversioner to be made a party to the suit.

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In the present case, the Superintendent of the Court of Wards claims in the plaint a right to sue on behalf of the minor as a reversionary heir, without alleging that there are no others nearer in the line of succession, or that those who are nearer have precluded themselves from suing.

In the course of the argument before their Lordships, it was contended that Adjdhia Pershad and Luchman Pershad, two of the sons, and Sheo Rutton and Ram Rutton, the two grandsons of Sitaram, had precluded themselves from suing to set aside the adoption and declaratory decree mentioned in the plaint; but no such allegation was made in the plaint, nor does the point appear to have been taken in the Courts below.

No issue was raised, nor was there any finding of either of the lower Courts, in support of that view of the case. The point is not even expressly alluded to in the respondent's case or reasons. Their Lordships cannot, at this stage of the case, give any effect to the contention.

Even if it were allowed to prevail, it would not apply to Beni Madho, who was stated to be alive, but not to have been heard of for some time. It does not appear, that he had been unheard of for a length of time sufficient to warrant a presumption of his death. Moreover, there was no allegation of his death, and no issue whether he was alive or dead, nor any evidence of an attempt to ascertain the fact. It must, therefore, be taken that there may be a son of a brother of Shunker-sahai's father in existence who is not precluded from suing. Consequently, the minor, who is merely the son of a daughter of a brother of the father, is not, under the rule applicable to such actions as the present, entitled to maintain the present suit.

It must further be remarked that it appears from the genea-

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logical table that Sitaram had three daughters who have sons living. They would be as near in succession to Shunkersahai as the minor plaintiff would have been, even if he had been a naturally born son.

It must also be borne in mind that even if Adjdhia Pershad, Luchman Pershad, Sheo Rutton; and Ram Rutton have precluded themselves from suing to set aside the adoption, the minor plaintiff could not, even if he were a naturally born son, and the adoption of the second defendant should be set aside, succeed to the property of Shunkersahai, if either of the sons or grandsons of Sitaram should survive the first defendant. The minor, admitting him to be a bandhu, has merely a very remote possibility of ever succeeding to the property of Shunkersahai. Their Lordships will, therefore, humbly advise Her Majesty to reverse the decisions of both the lower Courts, and to dismiss the suit, with costs, in both the lower Courts. The appellants' costs of this appeal must be paid out of the estate of the minor Chandra Shekhar.

Solicitor for the appellants: *Mr. T. L. Wilson.*

Solicitor for the respondent: *Mr. H. Treasure.*

APPELLATE CRIMINAL.

Before Mr. Justice Pontifex and Mr. Justice Field.

IN THE MATTER OF THE PETITION OF ASGUR ROSSEIN AND OTHERS.

1881

March 10.

THE EMPRESS *v.* ASGUR HOSSEIN AND OTHERS.*

"Incapable of giving Evidence"—Evidence Act (1 of 1872), s. 33—Duty of Committling Magistrate—Witnesses—Examination on Oath—Statements of Witnesses. ¶

The incapacity to give evidence mentioned in s. 33 of the Evidence Act need not be a permanent incapacity.

In re Pyari Lall (1) dissented from.

* Criminal Appeal, No. 67 of 1881, against the order of H. L. Oliphant, Esq., Judicial Commissioner of Chota Nagpore, dated the 15th December 1880.

(1) 4 C. L. R., 504.

The Magistrate to whom a complaint was made, examined certain persons on oath in the absence of the accused, merely for the purpose of ascertaining whether there was any, and what case, against the prisoners; and he did not take down in writing the statements of the persons so examined. *Held*, that the Magistrate was wrong in examining the witnesses on oath in the absence of the accused, or for the purpose of finding out whether there was a case; but that, having done so, he was not bound to take down their statements in writing.

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In this case one Asgur Hossein, a Police head constable, and four chowkidars, were charged with voluntarily causing hurt to two men, named respectively Dooli and Darshan. The committing Magistrate made an enquiry, not in the presence of the accused, in the course of which he examined certain persons, some of whom were afterwards called as witnesses. No note of these examinations was made by the committing Magistrate, though the persons examined were examined on oath. At the trial it was proved, that one of the complainants, Darshan, was ill, and confined to his house; and the Judge, under s. 33 of the Evidence Act, allowed in evidence the deposition which Darshan had made before the committing Magistrate. The prisoners, having been found guilty by the Sessions Judge sitting with assessors, appealed to the High Court.

Mr. M. M. Ghose for the appellants.—The prisoners have been prejudiced in their defence by the conduct of the Deputy Magistrate, who refused to give them copies of the depositions on which the committal was based. Again, the deposition of the complainant Darshan should not have been admitted in evidence, as there was no proof that he was “incapable of giving evidence” within the meaning of s. 33 of the Evidence Act. See *In the matter of Pyari Lall* (1).

The judgment of the Court (PONTIFEX and FIELD, JJ.) was delivered by

PONTIFEX, J.—(The learned Judge, having gone through the evidence, confirmed the finding of the Sessions Judge. His Lordship then continued.)

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The deposition before the Deputy Magistrate of one of the complainants (Darshan) was admitted by the Sessions Judge under s. 33 of the Evidence Act, it being stated by certain of the witnesses that he was ill and confined to his house. We are of opinion, that the evidence as to his illness was not sufficient to bring the case within s. 33 of the Evidence Act. The Sessions Judge ought to have required more precise evidence as to the nature of the illness and the incapacity of the witness to attend. A case has been cited to us, that of *Pyari Lall* petitioner (1), in which it was held, that the incapacity to give evidence mentioned in s. 33 must be a permanent incapacity. In our opinion, that is not a necessary construction. We are inclined to think, on the construction of the entire section, and from reference also to s. 32 which precedes it, that something short of permanent incapacity might satisfy the words of the section "incapable of giving evidence." It is not, however, necessary to decide that question in this case, or we might have to send the case before a Full Bench. It is sufficient in this case, without reading the deposition of Darshan, to support the conviction.

There was a preliminary objection which was taken, *viz.*, that the committing Magistrate had made a kind of preliminary enquiry, in which he examined certain persons, some of whom were afterwards called as witnesses; that the appellant before us applied for the depositions given by these persons; and that though they were so examined, in answer to his application no depositions were forthcoming. This Court called for an explanation on this point. The Deputy Magistrate explains that this preliminary enquiry was not an enquiry conducted in the presence of the accused; that the enquiry he made of these particular persons was for the purpose of finding out whether there was any and what case; and that he did not take down their statements in writing, though he did examine them after swearing them. We think it was ipso facto and improper to swear these witnesses on an occasion and for the purpose as stated, but having sworn them, we are of opinion that, under the cir-

cumstances, he was not bound to take down their statements in writing. As the Deputy Magistrate was only the committing officer, and as he did not try the case, we think that the accused has no cause of complaint in this respect.

The conviction will be confirmed.

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Conviction confirmed.

APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Field.

KANAI LALL KHAN AND ANOTHER (DEFENDANTS) v. SASHI BIHUSON
BISWAS AND OTHERS (PLAINTIFFS).*

1881
Feb'y. 9.

*Representative—Revivor of Suit—Substitution—Issue—Mortgage Decree—
Hindu Widow—Party to Suit—Res Judicata—Code of Civil Procedure
(Act X of 1877), ss. 13, 244.*

Where the plaintiff in a suit prays that a person may be substituted on the record as the heir of a defendant who has died, the Judge should raise an issue as to whether the person sought to be substituted is the heir of the deceased defendant.

In 1872, *A* brought a suit on a mortgage against the mortgagor, a Hindu widow, who died pending the suit. *A* then applied that the suit should be revived against *B* as the representative of the defendant. *B* denied that he was such representative, but the Judge refused to go into the question, made *B* a party, and gave *A* a decree for the sale of the mortgaged property. *B* subsequently brought a suit to have it declared, *inter aliu*, that the mortgage and decree only covered the widow's life interest.

Held, that the suit was not barred either as *res judicata*, or under the provisions of s. 244 of the Code of Civil Procedure.

PREVIOUSLY to the year 1863, Digambar Mondol, who was possessed of several immoveable properties in the 24-Pargannas, among which was a two-anna share of taluq Huda Rashkhali, died, leaving his widow Romoni his sole heiress under the Hindu law. On the 6th of October 1863, Romoni borrowed

* Appeal from Original Decree, No. 302 1879, against the decree of Baboo Brojendro Coomar Seal, First Subordinate Judge of the 24-Pargannas, dated the 21st July 1879.

1881 certain moneys from Aushotosh Dhur and Muttyloll Dhur, and
 KANAI LALL KHAN to secure the repayment of this loan she mortgaged the two-
 v. anna share of taluq Huda Rashkhali. The mortgagees after-
 SASHI BHUSON wards brought a suit on their mortgage, which they foreclosed
 BISWAS. on the 14th of March 1870, and, in execution of a subsequent
 decree, obtained possession of the property in the early part of
 the year 1872. On the 27th of May 1870, more than three
 months after the foreclosure decree, Romoni again mortgaged
 the two-anna share of taluq Huda Rashkhali, this time to one
 Ramdhone Khan. On the 17th of May 1872, Ramdhone Khan
 instituted a suit on his mortgage, and pending this suit, Romoni
 died on the 15th of June 1873. On the 10th of July 1873, the
 present plaintiffs Sashi Bhuson, Girendro Bhuson, and Monendro
 Bhuson Biswas (who at the death of Romoni were the next
 heirs in reversion of Digambar Mondol) were, at the instance
 of Ramdhone Khan, made parties by their father and guardian,
 as representatives of Romoni. On the 5th of August 1873, a
 decree was passed in favor of Ramdhone Khan, which declared
 the mortgaged property liable to satisfy the decree, and directed
 that, should the decree not be satisfied out of the sale of the
 property, then that the same should be realized from the estate
 left by the deceased debtor Romoni Dasi. In the early part of
 1877, the present plaintiffs instituted a suit against Muttyloll
 Dhur and Aushotosh Dhur, claiming possession of the property,
 on the ground, that Romoni mortgaged without necessity, and
 therefore the foreclosure proceedings passed only the interest of
 Romoni. On the 4th of September 1877, the plaintiffs obtained
 a decree, and shortly afterwards obtained possession.

On the 18th July 1878, Ramdhone Khan applied for execu-
 tion of the decree of August 1873 by sale of the mortgaged
 property. On the 27th of July 1878, the plaintiffs filed a peti-
 tion of objections, which were overruled, and this decision was
 affirmed on appeal, and the sale of the property ordered, subject
 to the claims of the reversioners.

On the 20th January 1879, the plaintiffs, under the provi-
 sions of s. 283 of the Code of Civil Procedure, filed the present
 suit against the heirs of Ramdhone Khan, claiming that Romoni
 borrowed the money from Ramdhone Khan for her own use, and

not for purposes which would constitute the mortgage binding on the reversioners; and that their rights were not liable to be sold under the decree of August 1873. They further contended, that no interest whatever passed under the mortgage, which has been executed subsequently to the foreclosure decree of Aushotosh Dhur and Muttyloll, Dhur. The lower Court gave a decree in favor of the plaintiffs, from which the defendants appealed.

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Baboo *Rash Behary Ghose* and Baboo *Saroda Churn Mitter* for the appellants.—This claim is *res judicata*, the present plaintiffs were parties to the suit in which the decree of August 1863 was passed, and it was then they should have raised their contention. At any rate, the questions which they raise are questions between the parties to the previous suit and relating to the execution of the decree, and by s. 244 of the Code of Civil Procedure no separate suit will lie. *Chowdhry Wahed Ali v. Mussamut Jumae* (1) and *Amceeroonnissa Khatoon v. Meer Mahomed Hossein Chowdhry* (2).

Baboo *Sreenath Doss* and Baboo *Kati Prosonno Dutt* for the respondents.

The judgment of the Court (McDONELL and FIELD, JJ.) was delivered by

McDONELL, J.—The facts of this case are briefly as follows: One Romoni Dasi, the widow of Digambar Mondol, borrowed Rs. 2,000 from the ancestor of the defendants in the present case upon the mortgage of a certain property. This money was not paid, and the mortgagee brought a suit against Romoni Dasi on the 17th May 1872, to enforce the mortgage lien against the mortgaged property. While that suit was pending, Romoni Dasi died; and on the 10th July 1873, the mortgagee applied to have the plaintiffs in the present suit substituted as defendants in the place of Romoni Dasi. In that petition the mortgagee stated, that the present plaintiffs, Sashi Bhuson Biswas and others, were the heirs of Romoni Dasi. These persons were at that time minors, and Bhoopal Chuuder Biswas was their father

(1) 11 B. L. R., 149; S. C., 18 W. R., 185.

(2) 20 W. R., 280.

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and guardian. Notice was served upon Bhoopal Chunder Biswas, and he, Bhoopal, came in and filed a petition on behalf of the minors.

In that petition it was distinctly asserted that the minors were not the heirs of Romoni Dasi; that they were sister's sons of Romoni Dasi's husband, Digambar Mondol, and as such, were the true heirs of Digambar Mondol, and were in no respect heirs of the widow Romoni Dasi, or of her stridhan. It is further alleged in that petition, that the debt incurred by Romoni Dasi was a personal debt incurred for her own benefit, and that it was not incurred for any legal necessity which would have the effect of making such debt chargeable upon her husband's estate.

The Subordinate Judge before whom the case was pending recorded the following order: "The heirs of the husband of Romoni Dasi have raised a new plea in the case, *viz.*, that the property secured in the bond could not be made liable for her personal debts. This plea is foreign to this suit. This could not have been raised by the deceased defendant, and they, coming in as her representatives, cannot be allowed to raise it. The property was described in the bond as belonging to the debtor herself, and not to her husband; and the question as to whether that statement is correct or not, cannot be legitimately tried in this suit. I leave these heirs to settle that question by a different suit, if they are really in earnest." Now there is undoubtedly an error in the part of this order, which says that the present plaintiffs came in as the representatives of Romoni Dasi. They did *not* "come in," if by that was meant coming in of their own accord. They were *brought* in by the mortgagee; and so far from coming in as heirs and representatives of Romoni Dasi, they, through their guardian, contended that they were not the heirs of Romoni Dasi, but the rightful heirs of Digambar Mondol. Before making these minors parties to the suit in the character of heirs of Romoni Dasi, it would have been proper for the Subordinate Judge to raise an issue and come to a judicial finding as to whether they were or were not the right heirs of Romoni Dasi.

We think it clear that no such issue was raised, and that no

such question was substantially decided between the parties. In the decree, the minors are not mentioned as heirs of Romoni Dasi, and the decree was passed against the mortgaged property with the further direction that any balance not realized therefrom should be realized from the other properties of the deceased judgment-debtor, Romoni Dasi. There was no direction that such unrealized balance should be recovered from any assets belonging to the estate of Romoni Dasi in the hands of, and undisposed of by, the minors, who are the present plaintiffs. Then it is clear that the words which we have above quoted—"I leave these heirs to settle that question by a different suit, if they are really in earnest,"—distinctly excluded from the adjudication in that suit the question whether the minors could be made liable as the right heirs of Digambar Mondol.

It was first contended before us by the learned pleaders for the appellants, that the present suit is barred by *res adjudicata*. We think it impossible to say, that a question not only not decided in the previous suit, but in express language excluded from the decision therein, can be treated as a *res judicata*, so as to stop the plaintiffs in the present case.

After the decree had been passed in the suit brought by the mortgagee, execution was taken out, and the property, which was the subject of the mortgage bond, was attached in execution. The present plaintiffs appeared before the Subordinate Judge, and raised an objection to the attachment of the property. The objection thus raised again in the execution-proceedings was substantially the same question which they had asked to have decided in the proceedings before decree, and which the Subordinate Judge had in express language refused to adjudicate. It is not to be wondered at, therefore, that the then Subordinate Judge refused to deal with this question in the execution stage. His order refusing to deal with it was appealed; and the order of the Appellate Court was, that the property should be sold, but at the same time that notice should be given that it was claimed by the reversioners,—that is, the plaintiffs in the present case,—as their own property.

The pleader for the appellants has addressed a long argument to us, contending that the question which the plaintiffs now ask

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1881 to have decided was a question which ought to have been decided between them and the present defendants in the execution-proceedings; that it was in fact a question falling within clause (c) of s. 244 of the present Code of Civil Procedure,—that is, a question between the parties to the suit in which the decree was passed or their representatives, and relating to the execution, discharge, or satisfaction of the decree. He has relied in support of this contention upon the case of *Chowdhry Wahed Ali v. Mussamut Jumaee* (1), decided by their Lordships of the Judicial Committee on the 14th June 1872, and the subsequent case of *Ameeroonnissa Khatoon v. Meer Mahomed Mozuffur Hossein Chowdhry* (2). We think, however, that the present case is one to be decided upon its own merits, and that its special circumstances take it out of the general rule which may be supposed to have been established by the cases just quoted. In the Privy Council case their Lordships say that they cannot concur in the *general proposition* that a party sued in a representative character is not a party to the suit within the meaning of cl. 11 of Act XXIII of 1861. They then refer to the 203rd section of the old Code of Civil Procedure, and they proceed to say:—"It is obvious, therefore, that a party in a representative character is so distinctly a party to the suit, that, under certain conditions, his own private property may be attached and sold. It is true that to fix him with this liability, it must be shown that he has received property of the deceased, of which he has failed to prove a proper disposition. But these things are all cognizable and proper to be ascertained in the suit in which the decree is made, during the progress of the execution-proceedings founded upon such decree. It does not seem to their Lordships to follow that, because all the provisions relating to execution cannot be applied to a defendant sued in a representative character, such a defendant cannot be regarded as a party to the suit within the meaning of such of them as may be applicable to this case." We entirely agree with what was said in the case of *Ameeroonnissa Khatoon v. Meer Mahomed Mozuffur Hossein Chowdhry* (2) that the above

(1) 18 W. R., 185; S. C., 11 B. L. R., F. B., 149.

(2) 20 W. R., 280.

remarks of their Lordships of the Judicial Committee are not to be treated as *obiter dicta* merely, but that they amount to an authoritative decision which this Court ought to follow. But it appears to us that these remarks do not go the length of establishing the proposition contended for before us,—*viz.*, that a party sued in a representative character is a party within the meaning of s. 11 of Act XXIII of 1861 (s. 244 of the present Code) for all purposes, and irrespective of the nature of the representative character in which such person is a party. The High Court had laid down a general proposition (1). The Privy Council intimated that they could not concur in that general proposition,—in fact, that the proposition was too widely put to be generally true, and they pointed out an instance in which the proposition so generally put could not be maintained. They do not, however, go the length of saying that the converse of this general proposition is true, and that a person, who is a party to a suit in any character, is a party in every other character which he may fill, and this irrespective of the question whether there are in the Code provisions as to execution, which apply to this case. We may apply another test. The questions mentioned in clause (c) of s. 244 are questions arising between the parties to the suit in which the decree was passed and relating to the execution, discharge, or satisfaction of the decree. Now, when a decree obtained against a particular person is sought to be executed against the heirs or representatives of that person, who have received a portion of his property, and are liable to the extent of the undisposed of assets in their hands, there can be no doubt that the decree is still the same decree; and this is in no way altered by the alteration in the person against whom it is sought to be executed. But in the present case it may be said, that the decree passed against Romoni Dasi and the property of Romoni Dasi and the heirs of Romoni Dasi, is different from a decree passed against the property of Digambar Mondol and the right heirs of Digambar Mondol. We do not, however, desire to base our decision upon this ground merely.

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(1) See the original judgment of the High Court, 2 B. L. R., F. B., 84-88; and the remarks of the Privy Council, above partly quoted, 11 B. L. R., 155.

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It appears to us that what was directed to be sold, was the right, title, and interest of Romoni Dasi; and looking, at the order of the District Judge, dated 24th December 1879, and the sale notification, we think it clear, that whatever interest the present plaintiffs might have in the property as reversioners, i.e., as the right heirs of Digambar Mondol, was expressly excluded from the sale. The first paragraph of the conditions of sale runs thus: "Beyond what right, title or interest the judgment-debtor has in the said properties, the rights of any other party or the properties connected therewith, shall not be sold." Now if we turn to the decree at p. 41, we find a direction, that the balance be realized from the properties of the deceased judgment-debtor, Romoni Dasi. It is, therefore, clear that Romoni Dasi, and Romoni Dasi alone, was treated as the judgment-debtor, and that what was sold was the interest of Romoni Dasi; and that the interests of the reversioners, the right heirs of Digambar Mondol, were distinctly and expressly excluded from the sale.

It may be, as argued before us, that the prayer for a perpetual injunction which the plaintiffs have inserted in their plaint cannot be granted in this form; but we think that this is not very material. What the plaintiffs subsequently ask is, to have it declared that the interest of Romoni Dasi in this property is nothing. When once that is found and declared, there will be no occasion for a perpetual injunction restraining the defendants from selling that which is worth nothing.

We have then to consider, whether there is enough on the record to enable us to say that the interest of Romoni Dasi in the attached property amounts to nothing. We think that this question falls within a principle acted upon in many cases,—namely, that where parties allow a suit to be conducted in the lower Court as if a certain fact was admitted, they cannot afterwards in appeal question this fact and recede from their tacit admission. No question was raised in the written statement before the Subordinate Judge as to Romoni Dasi having any other interest in the property than the life-interest which she had as heir of her husband Digambar Mondol. No express issue on this question was raised by the Subordinate

Judge; nor was he asked to raise such an issue, and the point has not been taken in the grounds of appeal to this Court.

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Then in the mortgage deed it is stated, that the property was let in ijara to Radha Mohun Mondol for a term of eight years; and we find at page 11 the ijara pottah executed by Romoni Dasi in favor of this Radha Mohun Mondol, in which it is stated, that the right of Romoni Dasi in the property was derived from the fact of her being the heiress of Digambar Mondol.

We do not say that the recitals in these two instruments would be sufficient evidence upon which to decide this question, if it really fell to be decided upon evidence; we merely advert to these recitals taken in connection with the conduct of the defendants in the Court below, as sufficient to satisfy our minds that no question as to Romoni Dasi having any other interest in the property than that of a Hindoo widow was ever seriously raised or disputed between the parties in the lower Court.

For these reasons, it appears to us that the decree of the lower Court must be affirmed, and this appeal dismissed with costs.

With respect to the form of the decree, we think it more appropriate to draw it up as a decree declaring that the mortgage debt was incurred by Romoni Dasi personally; that it is not binding upon any property of her husband Digambar Mondol in which she enjoyed a life-estate; and that Romoni Dasi had no interest beyond this life-estate in the property which forms the subject of this suit, and which the mortgagee has endeavoured to bring to sale after her death in execution of his decree.

Appeal dismissed.

Before Mr. Justice Morris and Mr. Justice Prinsep.

1881
Jany. 19.

BABA MOHAMED (DECREE-HOLDER) v. WEBB (JUDGMENT-DEBTOR).*

Execution of Decree—Satisfaction, plea of, in Bar—Civil Procedure Code (Act X of 1877), ss. 244 and 258.

Where a decree-holder, declared to be entitled to possession of certain land, subsequent to decree executed a patta in favor of his judgment-debtor, who was then in possession, and afterwards took out execution under his decree,—

Held—on an objection by the judgment-debtor that, under these circumstances, he was not entitled to possession—that satisfaction of the decree not having been entered up, such objection could not be dealt with under s. 244 of the Civil Procedure Code.

Held also, that s. 258 of the Civil Procedure Code deals with the adjustment of any decree, and not merely with the adjustment of a money-decree.

IN this case the appellant, Baba Mohamed, on the 18th March 1876, obtained a decree, which was affirmed on appeal on the 16th August 1876, against the respondent C. R. Webb, for possession of certain land, but had not, up to September 1879, attempted to execute it. In that month, however, he applied for execution; and on the 20th November, the respondent was dispossessed, having in the meantime failed to come in and show cause why the decree should not be executed against him, though notice had been served upon him to do so if he chose. Subsequently, he came forward and objected to being dispossessed, on the ground that, in January 1877, the appellant had agreed with him that he (the judgment-debtor) should remain in possession of the land, the subject of the decree, as tenant, and in pursuance of such arrangement the appellant had granted him a patta. He further stated, that the appellant had refused to register the patta, but that, on appeal from the order of the District Registrar, registration had been directed; but that it had never been actually carried out owing to the patta having

* Appeal from order, No. 189 of 1880, against the order of J. R. Hallett, Esq., Officiating Judge of Rungpore, dated the 25th March 1880, reversing the order of Baboo Premchand Paul, Munsif of Julpigori, dated the 27th January 1880.

been destroyed in a fire which had occurred in the Julpigori Government offices. It further appeared, that though no satisfaction of the decree had been entered up, the judgment-debtor had remained in possession of the land. The Munsif, by an order dated the 27th January 1880, considering that the objection could not be dealt with under ss. 244 and 258 of the Civil Procedure Code, declined to entertain it; and in dismissing the petition, left the judgment-debtor to establish his right to possession by a regular suit. From this order the latter appealed, on the ground that the execution of the patta showed, that the decree-holder had taken amicable possession, and that the decree had been thereby satisfied, and that the Munsif should not have refused to deal with the objection on its merits. The Officiating District Judge of Rungpore reversed the order and remanded the case to the Munsif to deal with the objection on its merits under s. 244. From this order the decree-holder appealed to the High Court.

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Baboo Hurry Mohun Chuckerbutty for the appellant.

Baboo Grija Sunker Mozoomdar for the respondent.

The judgment of the Court (MORRIS and PRINSEP, JJ.) was delivered by

MORRIS, J.—The question before us relates to an alleged adjustment of a decree, which was obtained on the 18th March 1876, and affirmed on appeal on the 16th August of the same year.

The decree-holder was declared by the decree entitled to partition of a specified share, and to be put in possession of the same. He took out execution in September 1879 (whereby this case comes under the provisions of Act X of 1877 as originally framed), and he was put in possession under the decree on the 20th November 1879. Thereupon the judgment-debtor objected, that, in January 1877, the decree-holder had obtained satisfaction of the decree, and that this was evidenced by a lease of the land covered by the partition-decree, which the decree-holder had given to him on that date.

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The first Court declined to take this lease into consideration, or to interfere with the possession that had been given to the decree-holder.

The Judge on appeal decided that, whether s. 258 of the Civil Procedure Code applied or not, this was a matter which the Munsif should have enquired into under s. 244; and he accordingly remanded the case to him to do this. It is against this order that the present appeal is preferred.

It seems to us that the Munsif was right in refusing to consider the matter of the lease in connection with the execution of the decree. If the decree had been adjusted in the manner alleged by the respondent, then, under s. 258, such adjustment ought to have been certified to the Court. Not having been so certified, it cannot now be recognized by the Court charged with the execution of the decree. It is urged on behalf of the judgment-debtor that s. 258 has reference only to money-decrees, and that this is apparent from its position in chap. xix of the Code in connection with the particular sections relating to money-decrees alone. But a consideration of the terms of the section leads us to a different conclusion. That section corresponds in all material respects, and carries with it the same meaning as s. 206 of the former Procedure Code (Act VIII of 1859), which manifestly deals with the adjustment of *any* decree. Again we cannot agree with the Judge that the case can be decided under the provisions of s. 244, whether s. 258 is applicable or not, for this would enable a Court in execution to deal with any question relating to the execution of a decree under s. 244, although the particular question then before it might be specially provided for by another section of the Code.

We, therefore, reverse the decision of the lower Appellate Court, and restore that of the first Court with costs.

Appeal allowed.

APPELLATE CRIMINAL.

Before Mr. Justice Pontifex and Mr. Justice Field.

IN THE MATTER OF THE PETITION OF BEHALA BIBI.

THE EMPRESS *v.* BEHALA BIBI.

1881
March 7.

Penal Code (Act XLV of 1860), s. 201—False Information.

A woman who, with her infant child, eloped from her husband's house, was afterwards arrested on a charge of murdering the child, which was missing. She made three different statements: (1) that she had left it with her husband; (2) that she had been enticed away by one R., who had taken the child from her; (3) that one H. had drowned the child. The Sessions Judge believed the last statement, and convicted her under s. 201 of the Penal Code.

Held, that the conviction was wrong, and must be set aside.

Section 201 of the Penal Code does not apply to a case where the person, who is the probable or possible offender, makes statements exculpating himself by inculpating another.

THE facts of this case are set forth in the judgment of Mr. Justice PONTIFEX.

No one appeared for the appellant or respondent.

PONTIFEX, J.—We think that the conviction in this case cannot be sustained.

The facts are as follows:—Behala, the appellant, with her infant, was sleeping in the same room with her husband. Her husband, on awaking about dawn, found her and her child missing. After some search, she was found at a relation's house, but without the child. As to what had become of the child she then, and subsequently, made contradictory statements. She said at one time that she had left it in the room with her husband. At another time she said that she had been enticed away by one Rakhal; that the child had cried, and Rakhal had said "let me go and leave it with its father;" that he then took the child away and quickly returned, upon which she and Rakhal went away together.

* Criminal Appeal, No. 86 of 1881, against the order of F. W. V. Peterson, Esq., Sessions Judge of Jessore, dated the 14th January 1881.

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Before the Magistrate she said that one Herasatula had enticed her away, and that he had thrown the child into the river.

The Sessions Judge has believed the last story, and has convicted the woman under s. 201 of the Penal Code of giving false information respecting the murder of Ujjala, her infant, with the intention of screening the murderer from legal punishment, *i. e.*, with the intention of screening Herasatula. The information said to be false is that contained in her statement as to Rakhal. Now there is no evidence to show that the story about Herasatula is more true than that about Rakhal, and there is no good reason why the Judge should adopt one story rather than the other.

As to what the woman stated about Rakhal, the evidence is very meagre as to the exact language and the exact occasion upon which this language was used; and the statement as given by the Police Officer Bereshur is certainly not information respecting the *murder of Ujjala*, for she said merely that Rakhal had taken the child away after expressing an intention of leaving it with its father.

The unfortunate woman appears to have disappeared by night from her husband's side, and there is much reason to suppose that she took her infant with her. She was found some time after without her infant, which was of too tender an age to take care of itself. Under these circumstances, grave suspicion attached to the woman. When she was arrested, she made contradictory statements as to what she had done with the child. Her manifest object in making these statements was to exculpate herself. We think that s. 201 of the Penal Code was not intended to apply to such a case—a case, that is, in which the person, who is the possible or probable offender, makes statements exculpating himself by inculpating another.

That Herasatula murdered the child, and that Behala knowing this gave information respecting the murder, with the intention of screening Herasatula from punishment, rest upon no evidence. We reverse the conviction and direct the release of the appellant Behala.

Conviction set aside.

APPELLATE CIVIL.

Before Mr. Justice Pontifex and Mr. Justice McDonell.

TARUCK CHUNDER MOOKERJEE (DEFENDANT) v. PANCHU
MOHINI DEBYA (PLAINTIFF).*

1881
Feb. 17.

*Suit for Rent—Splitting Claims—Code of Civil Procedure (Act X of 1877),
s. 43.*

At the close of the Bengalee year 1283, which was on the 11th of April 1877, the defendant owed to the plaintiff, his landlord, the rents of his holding for the years 1281, 1282, and 1283. The plaintiff, in the month of April 1878, before the close of the year 1284, instituted a suit for the rent for 1281 only, and obtained a decree. On the 10th of April 1879, he instituted another suit for recovery of the rents for the years 1282, 1283, and 1284. *Held*, that the claim for the years 1282 and 1283 was barred under s. 43 of the Code of Civil Procedure.

The cases of *Raja Sutto Churn Ghosal v. Obhoy Nund Doss* (1), *Ram Soondur Sein v. Krishno Chunder Goopto* (2), and *Kristo Kinkur Puramanick v. Ram Dhun Chettangia* (3) are overruled by s. 43 of Act X of 1877.

THE facts of this case are set forth in the above headnote and in the judgment of Mr. Justice PONTIFEX. The plaintiff obtained a decree in the Court of first instance, and this decree was affirmed on appeal. The defendant then appealed to the High Court.

Baboo *Gurudas Banerjee* and Baboo *Nogendra Nath Roy* for the appellant.

Baboo *Amarendronath Chatterjee* for the respondent.

Baboo *Gurudas Banerjee* for the appellant.—The lower Courts are wrong in holding that the claims for 1282 and

* Appeal from Appellate Decree, No. 2111 of 1879, against the decree of Alexander T. Maclean, Esq., Judge of the 24-Pargannas, dated the 12th of August 1879, affirming the decree of Baboo Romesh Chunder Lahiri, First Munsif of Basirhat, dated the 26th of May 1879.

(1) 2 W. R., Act X Rul., 31.

(2) 17 W. R., 380.

(3) 24 W. R., 326.

1881 1283 are not barred under s. 43 of the Code of Civil Procedure. At the time the previous suit was instituted in April 1878, the plaintiff's title to the rents of 1282 and 1283 had accrued. The claim for the rent of 1281 arose out of the same cause of action as the claim for the rents of 1282 and 1283,—namely, the nonpayment of rent due under the defendant's lease; and as the claim under the later years was not insisted on then, it cannot be put forward now. The lower Courts' judgment cannot be supported, except on the ground, that each year's rent constituted a separate cause of action; but that is clearly not the case, since the passing of the illustration to s. 43 of Act X of 1877, whatever it may have been before that Act came into force.

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Baboo *Amarendronath Chatterjee* for the respondent contended, that the present case was concluded by *Raja Sutto Churn Ghosal v. Obhoy Nund Doss* (1), *Ram Soondur Sein v. Krishno Chunder Goopto* (2), and *Kristo Kinkur Puramanick v. Ram Dhun Chettangia* (3).

The judgment of the Court (PONTIFEX and McDONELL, JJ.) was delivered by

PONTIFEX, J.—In April 1878 rent being due from the defendant to the plaintiff for the years 1281, 1282, and 1283, the plaintiff instituted a suit for the rent of 1281, for which she obtained a decree.

Although that suit was instituted after Act X of 1877 came into force, the plaintiff did not include in her suit the rents for 1282 and 1283, which were also then due.

In April 1879, the plaintiff instituted the present suit for the rents of 1282, 1283, and 1284. With respect to the rents of 1284, it appears from the judgments of the Courts below that, at the time of the institution of the former suit, the year 1284 had not expired, and therefore the entire rent for that year had not become due. The present suit would, therefore, lie for the rent of 1284.

(1) 2 W. R., Act X Rul., 31.

(2) 17 W. R., 380.

(3) 24 W. R., 326.

But objection was taken by the defendant to the suit so far as it related to the rents of 1282 and 1283, on the ground, that they should have been included in the former suit in accordance with the provisions of s. 43 of Act X of 1877.

Now it was decided in *Raja Sutto Churn Ghosal v. Obhoy Nund Doss* (1) that a separate suit would lie for the rents of each year, and that decision became the foundation of two other decisions by this Court—in *Ram Soonder Sein, v. Krishno Chunder Gupto* (2) and *Kristo Kinkur Poramanick v. Ram Dhun Chettangia* (3).

Speaking for myself, I do not consider that the reasons given in the decision of *Raja Sutto Churn Ghosal v. Obhoy Nund Doss* (1) are satisfactory; and I should have been reluctant to be bound by it. But s. 43 of Act X of 1877, with the illustration thereto, is a direct legislative reversal of that decision. Now, so far as the Court is concerned, that decision, with the two other cases founded on it, had established a procedure which, until Act X of 1877 came into operation, would have been a sufficient authority for the course pursued by the plaintiff in her suit No. 467 of 1878. But a different procedure having been ordained by s. 43 of Act X of 1877, which came into force on the 1st of October 1877, the authority of the three cases referred to has, in my opinion, been swept away.

It is true the illustration to s. 43 represents only the exact state of circumstances which existed in the case of *Raja Sutto Churn Ghosal v. Obhoy Nund Doss* (1), and it would have been clear if the illustration had been general and not confined to the peculiar circumstances of that case. But it was certainly intended to reverse the decision of *Raja Sutto Churn Ghosal v. Obhoy Nund Doss* (1), and with it the entire foundation of the decisions in the two other cases likewise fails. In my opinion, there can be no reason to distinguish between a suit omitting to claim an earlier rent and a suit omitting to claim a later rent which is due at the date of its institution. The illustration certainly treats a claim to all arrears of rent as a single cause of action.

(1) 2 W. R., Act X Rul., 31.

(2) 17 W. R., 380.

(3) 24 W. R., 326.

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I am unable, therefore, to agree with the interpretation which the learned Judge in the Court below has placed on s. 43 of Act X of 1877, and I am of opinion that the plaintiff was bound by that section to claim in her suit of 1878 the rents of the years 1282 and 1283, and that, having failed to do so, her present suit does not lie for these rents. The decrees of the Courts below will, therefore, be reversed so far as relates to the rents of 1282 and 1283, and will be affirmed so far as relates to the rent of 1284.

This being a case of a defaulting lessor, we think there should be no costs either in this or in the lower Courts.

Decree varied.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

1881
 Feb. 1, 2, 7,
 8, and 28.

SARKIES (PLAINTIFF) v. PROSONOMOYEE DOSSEE AND OTHERS.
 (DEFENDANTS).

Dower—Introduction of English Law—Freehold Estates of Inheritance—Armenian Widow—English Law how far applicable in Calcutta—Succession Act (X of 1865), s. 4—Estoppel—Admissions by Conduct—21 Geo. III, c. 70, s. 17—Dower Act (XXIX of 1839).

The widow of an Armenian, married before the Dower Act (XXIX of 1839), is entitled to dower out of lands which her husband held during the marriage for an estate of inheritance, as against a Hindu purchaser for value from the husband during his life, the English law of dower having been recognized in this country amongst Europeans and Armenians as a branch of the law of inheritance.

Per GARTH, C. J.—Estates which have been held by British subjects under the name of freehold estates of inheritance, are, in all essential respects, the same estates which have been held in England under the same name.

The case of *The Mayor of Lyons v. The East India Co.* (1) does not mean to decide that the Courts of this country are justified in adopting just so much of the law of inheritance, or of dower, or of any other law, as they consider equitable, and rejecting the rest. It only points out that there are certain portions of the English Statute law which from their very nature were

only passed for reasons connected with England, and which would not be applicable in India or any Colony of the British Crown,—*e.g.*, the Mortmain Acts, the Law of Aliens, and the like.

The provisions of s. 4 of the Succession Act are prospective, and leave rights unaffected which had already been acquired before the Act passed.

Per PONTIFEX, J.—The true construction of s. 17 of 21 Geo. III, c. 70, must confine the words “their inheritance and succession” to questions relating to inheritance and succession by the defendants.

The deed of conveyance of land in Calcutta recited that the vendor was “seised of, or otherwise well entitled” to, the property intended to be sold “for an estate of inheritance in fee-simple,” and it purported to convey such an estate. In a suit for dower by the vendor’s widow against the heirs of the purchaser.

Held, that although, as between the plaintiff and the defendants, there was no estoppel which could prevent the defendants from proving that the estate sold was other than an estate in fee-simple, yet, as the purchaser bought the property as and for an estate of inheritance and paid for it as such, the recital was *prima facie* evidence against the purchaser and persons claiming through him; that the estate conveyed was what it purported to be, it being an admission by conduct of parties which amounted to evidence against them.

APPEAL from a decision of WILSON, J.

This was a suit by the widow of an Armenian, married before the Dower Act (XXIX of 1839) came into force, for dower out of lands in Calcutta, which had been conveyed by her husband to a Hindu purchaser for value, and which lands had descended to the defendants. The conveyance to the defendants’ ancestor was in the English form. It recited that the vendor was “seised of, or otherwise well entitled” to, the property intended to be sold “for an estate of inheritance in fee-simple,” and it purported to convey such an estate to the purchaser.

The defendants contended, that although dower would attach to lands in Calcutta as against the heir of the husband, yet it would not attach as against a purchaser for valuable consideration from the husband.

Mr. Bonnerjee and Mr. Agnew for the plaintiff.

Mr. Phillips and Mr. J. G. Apcar for the defendants.

WILSON, J.—The main question in this case is a pure question of law,—namely, whether, by the law in force in Calcutta, the widow of an Armenian, married before the Dower Act (XXIX of 1839), is entitled to dower out of lands which

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her husband held during the marriage for an estate of inheritance, as against a Hindu purchaser for value from the husband during his life.

There is, so far as I can find, no express authority upon the question. It must, therefore, be dealt with upon consideration of principle.

The plaintiff's claim is founded upon two propositions,—1st, that, by the law of England, a widow would, under like circumstances, be entitled to dower; 2nd, that the law of England governs the present case.

The first of these propositions is no doubt correct. The question is as to the second. It is often said that the law administered by this Court is,—except in certain matters affecting Hindus and Mahomedans, and except so far as statutory provisions have modified it,—the Common Law of England as it existed in 1726. But this statement, though, no doubt, in general sufficiently accurate, is not absolutely correct. The true principles to be followed by this Court, when called upon to apply a rule of English law not previously applied, are clearly laid down by the Judicial Committee in *The Mayor of Lyons v. East India Co.* (1).

The questions to be answered in each case are stated at page 272:—"Has the English law (upon the point in question) been introduced?" "If that law has never been introduced, has there been such an introduction of the English law generally, that those parts which have been introduced draw along with them the law in question?"

The rule of English law which the plaintiff in this case seeks to apply has, certainly, not been introduced into Calcutta by any express declaration; nor, so far as I can learn, has it ever been sanctioned by any judicial decision. I cannot find any trace of it throughout the whole period during which the Supreme Courts and the High Courts have existed in the Presidency-towns.

Has then any branch of English law been so generally introduced as by reasonable implication to carry this law with it? I think not.

There is authority for saying that the English law of inheritance to real estate was introduced: *Gardiner v. Fell* (1) and *Freeman v. Fairlie* (2). The rule that the heir-at-law takes subject to the widow's right to dower, may well be regarded as a rule of the law of inheritance. And, accordingly, in some of the cases cited at the bar, the Supreme Court assigned dower to the widow as against the heir-at-law. But the rule that a wife's right to dower attaches by marriage, and follows the land in the hands of a purchaser, is a peculiar and characteristic doctrine of the feudal law, and can only, it seems to me, prevail in Calcutta, if it can be affirmed that the English law of real property was introduced into Calcutta in its entirety. But this proposition is expressly negatived by the Privy Council in the case to which I have referred. On this ground I am of opinion that the plaintiff's claim fails. It is, therefore, unnecessary to consider any of the other questions which have been discussed.

From this decision the plaintiff appealed.

Mr. *Evans* and Mr. *Agnew* for the appellant.

Mr. *Phillips* and Mr. *J. G. Apcar* for the respondents.

Mr. *Evans*.—There is only one right of dower; the old common law right, applicable. In Calcutta it has always been the practice for the wife to join to bar her dower. Lands in Calcutta have always been conveyed with regular investigation of title. They are held as freeholds of inheritance, and dower is assignable out of them. [PONTIFEX, J.—It would take away from the mutuality of contract between husband and wife to hold that the widow is not entitled to dower as against a purchaser from the husband. The husband is entitled to an estate by the curtesy in his wife's lands.] The Dower Act (XXIX of 1839) recites, that it is expedient to extend the amendments in the English law of dower to the territories of the East India Company in cases which, but for the passing of the Act, would be governed by the English law of dower as it existed previously; and s. 4 of that Act provides that no widow shall be

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(1) 1 Moore's I. A., 299.

(2) *Id.*, 305.

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entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will. This shows that the Legislature considered that the English law of dower applied. Armenians have no law of their own and are governed by the English law; and an Armenian widow has been held to be entitled to dower—*Emin v. Emin* (1). In the case referred to by the learned Judge in the Court below—*The Mayor of Lyons v. The East India Co.* (2)—Lord Brougham says, that alien widows have had dower assigned to them. The law of dower is not of feudal origin. Its origin is uncertain—Peterdorff's Abridgment, Tit. Dower; but it was in existence before the conquest, and was in fact abridged by the feudal law. It attaches in England to lands of gavelkind and borough English tenure. The question is, whether the law of dower was introduced into this country; and if so, what law was it? English, or what other? The only law of dower we know is the English law, and its existence has been repeatedly recognized in these Courts. The only law applicable to British subjects other than Hindus and Mahomedans is the English laws: *Emin v. Emin* (1), *Stephen v. Hume* (3), *Musleah v. Musleah* (4), *Joseph v. Ronald* (5), *In the matter of Cachick* (6). There is no case which expressly decides that dower will attach as against a purchaser; but in *De la Cruz v. Goorachand Seal* (7) the Court considered that it would. [GARTH, C. J.—If we are to apply the law of dower at all, why should we stop at a particular point and refuse to apply it in its entirety? PONTIFEX, J.—Was the husband seised?] The conveyance recites that he is seised and possessed of the property as and for an estate of inheritance in fee-simple. The learned Judge admits that dower attaches as against the heir, but refuses to extend the law on the authority of *The Mayor of Lyons v. The East India Co.* (2). But that case is based on *The Attorney-General*

(1) 1 Morley, 300; Morton by Mon-
triau, 242.

(5) Morton by Montriau, 111.

(2) 1 Moore's I. A., 276.

(6) 1 Morley, 375; Morley's Intro.,
pp. 187, 298.

(3) Fulton, 224.

(7) Clarke's Addl. Rules and Orders,

(4) Fulton, 420; 1 Boulnois, 234: 335.

v. *Stewart* (1), which shows that laws having only a local effect, and applicable only to England, such as the Mortmain Acts, are not to be considered as introduced into a Colony. Dower does not come under this class of cases. The reasons given in *The Attorney-General v. Stewart* (1) were followed in *The Advocate-General of Bengal v. Rane Surnomoyee* (2). That lands in Calcutta are freehold of inheritance appears from *Gardiner v. Fell* (3) and *Freeman v. Fairlie* (4). •

[He was stopped by the Court.]

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Mr. *Phillips*.—There is no evidence that this is an estate of inheritance in fee-simple. The recital in the deed is not evidence against my client. It is merely the vendor's statement of his own title. There would be great inconvenience in extending the right of dower as against a purchaser from the husband. The natives of this country are not familiar with English law, and a Hindu purchaser would never think of enquiring whether such a right existed. There is no such estate existing in this country as an estate of fee-simple in inheritance, and dower can only attach on such an estate. It was necessary to introduce a law of inheritance, and the English law was followed, and dower has been assigned as against an heir-at-law. But dower was only partially introduced; it cannot be assigned as against any one but the heir. This is an artificial conveyance, and the wife was not asked to join. That shows that the purchaser was not aware of her existence. The letter of the Court of Directors in 1792, Tagore Law Lectures, 1874, p. 283, shows, that the English law relating to land had not then been introduced. None of the cases go so far as to say that dower is assignable against a purchaser. They do say that it is assignable as against the heir, and so far they are binding; but the law should not be extended; the inconvenience and injustice of doing so would be very great. [GARTH, C. J.—There is no more injustice in enforcing that charge than any other. A purchaser must look to his title

(1) 2 Mer., 160.

(3) 1 Moore's I. A., 299.

(2) 9 Moore's I. A., 425.

(4) *Id.*, 305.

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and see what incumbrances there are on the property. **PONTIFEX, J.**—If a Hindu governed by the Mitakshara law comes to Calcutta, and buys land here, and a Hindu governed by the Dayabhaga buys from him, he would buy subject to the rights of the vendor's sons, and could not contend that he was ignorant of the Mitakshara law.] The only case in which it is expressly decided that a widow is entitled to dower is *Emin v. Emin* (1), and that case goes too far, for it shows that dower would attach to lands in the mofussil. In none of the other cases is there any express decision to that effect, *Doe dem* and *Savage v. Bancharam Tagore* (2); *Joseph v. Ronald* (3), *Jebb v. Lefevre* (4). The utmost reached in *Freeman v. Fairlie* (5) is, that an equitable fee exists, and that is not an estate out of which dower can be assigned. It is an incident of real estates in this country that they are assets in the hands of executors for the payment of debts. That shows that they are not technically estates of inheritance. [**PONTIFEX, J.**—In England real estate may be assets in the hands of executors for the payment of debts: *Robinson v. Lowater* (6).] There must be a legal estate of inheritance in fee-simple in order that dower may attach. No case decides that such an estate exists in India. That point was not decided in *Freeman v. Fairlie* (5); the only question there was, whether a will attested by two witnesses passed land: it was enough to consider where the estate was to go, whether to the legal personal representatives or to the heir. The fact that was customary to levy fines to bar dower does not prove that fee-simple estates existed, but merely that it was thought advisable to take precautions to prevent the widow from claiming. The right to dower was swept away by the Succession Act. Section 4 provides that no person shall by marriage acquire any interest in the property of the person whom he or she marries; and ss. 25-28 provide for the widow in case of intestacy. [**GARTH, C. J.**—Dower has the effect of a settlement on the

(1) 1 Morley, 300; Morton by Mon-
triau, 242.

(2) Morton by Montriau, 105.

(3) *Id.*, 111.

(4) Morton by Montriau, 152.

(5) 1 Moore's I. A., 305.

(6) 17 Beav., 592; 5 D. M. G., 272.

marriage; it is a charge which the husband cannot alienate without the consent of the wife.] It cannot have been intended that a widow should get her dower and also the provision under the Act. He also referred to s. 17 of 21 Geo. III, c. 70.

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Mr. Agnew in reply referred to *Nekram Jemadar v. Iswari-prasad Pachuri* (1) and *Jagadamba Dasi v. Grob* (2).

GARTH, C.J.—The plaintiff is the widow of an Armenian gentleman, to whom she was married in the year 1837; and she claims, in this suit, to have her dower assigned to her out of certain lands in Calcutta, which belonged to her husband at the time of the marriage, but were afterwards sold by him to one Bungshee Dhur Dutt and Nobin Chunder Dutt by an indenture dated the 9th of May 1866.

The defendants' title is derived from the purchasers under that deed; and their contention, stated broadly, is, that the English law of dower is not applicable to a case of this kind.

The learned Judge in the Court below appears to have considered, that although lands held by Armenian subjects in Calcutta are subject generally to the English law of inheritance, and although the law of dower might have formed a portion of that law, yet, as there is no direct authority for the position that a widow in this country can enforce her right to dower as against a purchaser from her husband, he was not bound to extend the law of dower to such a case, and he therefore dismissed the plaintiff's suit.

Now, it being once established, that the law of dower has always been recognized as a part of the law of inheritance in this country, that Armenians are subject to that law, and that the property in question was held by the plaintiff's husband for an estate to which the law of dower would attach, I confess I should feel great difficulty in placing any arbitrary limit upon that law, and in denying the plaintiff, as against a purchaser from her husband, the rights to which she is admittedly entitled as against his heir.

Mr. Phillips, who argued the case on behalf of the respond-

(1) 5 B. L. R., 643.

(2) *Id.*, 639.

1881 ents, seemed rather sensible, as I thought, of this difficulty;
 SARKIES and he, therefore, preferred to take the bolder course of con-
 v. tending, not only that the law of dower has never been re-
 PROSONO- cognized here in the same way as it has been in England, but
 MOYEE that estates held here by Europeans, although they might in
 DOSSEE. one sense be estates of inheritance, were not estates of that
 particular character to which the right of dower could legally
 attach. And he has also relied on two or three other points,
 which I shall proceed to deal with in their proper place.

The case has been argued at some length, and our attention has been called to a great many authorities; but I am bound to say, that from first to last I have never entertained the slightest doubt, either that the law of dower has been recognized in this country, amongst Europeans and Armenians, as a branch of the law of inheritance, or that estates which have been held by British subjects under the name of freehold estates of inheritance are in all essential respects the same estates which have been held in England under the same name.

Indeed, I should be extremely sorry to think that at this day any doubt could reasonably be thrown upon either of these propositions. For a long series of years estates of inheritance have been enjoyed and dealt with by British subjects here in the same way as they have been in England. They have been bought and sold as such. They have been transferred from hand to hand by modes of conveyance which are only applicable to English tenures, and meaningless as applied to any other tenures. They have been considered and treated as such by the Supreme Court since its first establishment; and they have been made the subject of real actions, which we all know constituted a machinery quite inappropriate to any other than English tenures. And lastly, they have over and over again been recognized and dealt with as such by the Indian Legislature.

In fact, if Mr. Phillips's argument is well founded, it seems to me, that not only proprietors of land themselves, but also the legal profession, and the Courts of law, and the Legislature, have all for years past been labouring under a very serious mistake.

So long ago as the year 1815, we have the direct authority of the Supreme Court in the case of *Emin v. Emin* (1) deciding—

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1st, that the English law of dower was at that time recognized, and enforced here as it was in England; and 2ndly, that Armenian subjects of the British Crown resident in Calcutta were amenable to that law.

In that case a bill was filed by the widow of an Armenian against the heir-at-law (being the eldest of two sons of her deceased husband), praying to have her dower assigned. Her husband was also an Armenian; and the lands out of which the dower was claimed, and of which the husband was alleged to have been seised for an estate of inheritance in fee-simple, were, for the most part, within the town of Calcutta, though a small portion of them were situate in a neighbouring mouza.

A decree was made in favor of the plaintiff by Sir Edward Hyde East and Sir W. Burroughs, that the dower should be assigned by a commissioner in the usual way; and a final decree was subsequently made confirming the commissioner's report, by a Court which consisted of Sir Edward Hyde East, Sir Francis Macnaghten, and Sir Anthony Buller.

From that time to the present, as far as we know, the correctness of this decision has never been questioned, and we have the further evidence that the law of dower was fully recognized, from the fact that a large number of fines have been produced before us from amongst the records of the Supreme Court, which have been levied from time to time for the express purpose of barring dower.

Then we have the Dower Amendment Act of 1839, passed by the Legislature of this country, corresponding in most of its provisions with the Dower Amendment Act in England, the 3 and 4 Wm. II, c. 105.

If the contention of the defendants were right, there could have been no such thing in this country as the law of dower, because there were no estate to which that law could legally attach. But the preamble of this Act distinctly affirms the existence of that law in India, and the necessity for amending it as it had been amended in England.

(1) Morten by Montriau, p. 242.

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The various sections of the Act treat of the doctrine of "seisin," of "rights of entry," and of "equitable," as distinguished from "legal estates of inheritance," in language which would have no meaning, unless the English law of inheritance prevailed in this country.

It seems to me, therefore, that even if we entertained any doubt upon the subject, which I certainly do not, it would not be possible for us at the present day to ignore the existence of a law thus distinctly affirmed, both by the Supreme Court and the Legislature. As a matter of principle, there would seem to be at least as much reason, why amongst British subjects in India a provision should be made by law for a wife's maintenance as in England. And if this principle is conceded, it is difficult to see why a wife should have less power of enforcing her rights against a purchaser from her husband than she had in England.

It then being once established that the law of dower has prevailed in this country, we have no right, as it seems to me, to contest or modify that law according to our own notions of justice: we must administer it in its integrity; and we have no more right to deprive the plaintiff of the benefit of it by holding (contrary to its well-known rules) that her husband could deprive her of her dower, by aliening his lands to a stranger, than we should have to hold, that a tenant for life or in tail might sell the inheritance absolutely, to the prejudice of the reversioner or remainderman.

Besides, it seems to me, that s. 4 of the Dower Amendment Act is itself an authority, that, before the Act, a husband could not alien or devise his lands so as to deprive his wife of her dower. That section purports to *deprive a wife of her right to dower in lands, which may have been aliened or devised by her husband in his lifetime*, which means, if it means anything, that in the view of the Legislature, a wife, before the Act, *had a right to dower in such lands*. The section would not only be superfluous, but misleading, unless the wife had such a right.

The learned Judge in the Court below has alluded to the judgment of the Privy Council in the case of *The Mayor of Lyons v. The East India Co.* (1), as affording an authority,

that the English law of inheritance was not introduced here in its entirety, but only so much of it as was applicable to the state of things in India. But that case, as I read it, does not mean to decide that the Courts of this country are justified in adopting just so much of the law of inheritance or of dower, or of any other law, as they consider equitable, and rejecting the rest. It only points out, that there are certain portions of our English Statute law, which from their very nature were only passed for reasons connected with England, and which would not be applicable to India, or any other Colony of the British Crown, as for instance, the Mortmain Acts, the Law of Aliens, and the like.

That part of the law of dower, which we are called upon to administer in this case, is obviously quite as necessary to the due enforcement of the wife's rights in India as it would have been in England.

Then it was suggested, rather than argued, by the defendants' counsel, that although as against a European or any other purchaser (except a Hindu or Mahomedan), the wife might enforce her rights, s. 17 of 21 Geo. III, c. 70, prevents her from enforcing them as against a Hindu purchaser.

That section enacts as follows :—

“Provided always, and be it enacted, that the Supreme Court of Judicature at Fort William, in Bengal shall have full power and authority to hear and determine, in such manner as is provided for that purpose in the said Charter or Letters Patent, all and all manner of actions and suits against all and singular the inhabitants of the said city of Calcutta, provided that their inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party shall be determined, in the case of Mahomedans, by the laws and usages of Mahomedans, and in the case of Gentoos, by the laws and usages of Gentoos; and where only one of the parties shall be a Mahomedan or Gentoos, by the laws and usages of the defendant.”

It is suggested that as against the defendants here, who are Hindus, the Hindu law of inheritance ought to prevail; and that as the Hindus recognise no rule of dower, the plaintiff

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cannot enforce that law as against the present defendants. This point, however, was not seriously pressed upon us. It may not be very easy to define what the concluding words of the section really mean; but whatever their proper construction may be, it is clear that they do not mean this, that where a Hindu purchases land from a European, in which the vendor has only a limited interest, the Hindu purchaser is to be in any better position as regards his purchase than a European purchaser would be. If the plaintiff's husband had no power to defeat her right by selling his land to a European, it is clear to me that he had no power to do so by selling to a Hindu or Mahomedan.

Then it was also contended, that assuming the plaintiff to have had an inchoate right to dower at the time when the Indian Succession Act (X of 1865) passed, she was deprived of her right by virtue of that Act. It was argued that s. 27, which provides what property of the husband the wife shall be entitled to in the event of his dying intestate, impliedly, though not expressly, deprived her of any other provision to which she was entitled at the time of the passing of that Act. But I think we cannot put any such construction on s. 27. If the plaintiff had an inchoate right to dower at the time of the passing of the Act, nothing short of express words could deprive her of that right.

Indeed, s. 4 seems to exclude the notion of a wife, who was entitled to dower when the Act passed, being deprived of it by s. 27. It enacts that "No person *shall by marriage acquire any interest* in the property of the person whom he or she marries." That is evidently a prospective provision; and it is intended, as it seems to me, to leave rights unaffected which had already been acquired before the Act passed.

The only remaining point argued by Mr. Phillips was one of a somewhat technical nature. It is not noticed in the judgment of the lower Court, and was evidently considered of no weight; and if I thought there was anything in it, I should certainly have been disposed to allow the plaintiff to call additional evidence.

It is said that there was no sufficient proof in the Court be-

low that the husband's estate in the property in question was an estate in fee-simple.

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Mr. Phillips called no evidence on this point, nor offered to call any; nor did he pretend to say that the estate which his client's ancestors had bought from the plaintiff's husband was other than an absolute estate, which is known here by the name of a fee-simple. His bare contention was, that the plaintiff was bound to prove that the estate sold was an estate of inheritance, and that she had failed in that proof.

The conveyance, however, under which the defendants claim, and which was put in by the plaintiff, contains a recital that the vendor "*is seised of, or otherwise well entitled to, the property intended to be sold for an estate of inheritance in fee-simple,*" and it purports to convey that estate to the purchasers.

Although, therefore, as between the plaintiff (who was no party to the deed) and the defendants, there was no estoppel, which would prevent the defendants from proving that the estate sold was other than an estate in fee-simple, yet as the purchasers bought the property as and for an estate of inheritance, and paid for it as such, I consider that is clearly *primâ facie* evidence against them and the defendants as claiming under them, that the estate was what it purported to be.

It is one of those admissions by conduct of parties which amounts to evidence against them. If a written contract was made between buyer and seller with regard to the purchase of a horse, that contract (quite apart from any question of estoppel) would be *primâ facie* evidence as against both buyer and seller that the thing sold was a horse. It would of course be perfectly competent for either of them to show that the thing sold was *not a horse*, but *primâ facie* their contract and their conduct would be evidence the other way.

I am of opinion, therefore, that, as against the land in the possession of the defendants, the plaintiff is entitled to have her dower assigned; and that the usual decree should be made, appointing a commissioner for that purpose.

I think also that the plaintiff ought to have her costs in this Court and in the Court below on scale 2.

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PONTIFEX, J.—I also am of the same opinion. The very learned argument of Mr. Phillips might have had some weight in a bygone age dusty with the lore of Fearn and Preston. But it seems to me, for the reasons stated by my Lord, to be now of purely antiquarian interest; and even if it could have had any successful issue before the Courts, and the Legislature had, as Mr. Phillips argues, been misled by a false analogy, it is now propounded unfortunately about a century too late.

I will add one word with respect to s. 17 of 21 Geo. III, c. 70. It seems to me, though the language is a little confusing, that the true construction of the section must confine the words "their inheritance and succession" to questions relating to inheritance and succession by the defendants. The present is a question of the plaintiff's succession, and therefore not determinable by the laws and usages of the Gentoos.

GARTH, C.J.—A question has been raised between the parties upon this judgment, from what time the defendants are bound to account to the plaintiff for the profits of the property. We find that, in the case of *Emin v. Emin* (1), an account of the profits was ordered from the death of the plaintiff's husband; and probably in a suit for dower against the heir or devisee of the husband, that would be the ordinary rule. But in the present case, it does not appear that the defendants had any notice, until the suit was brought, that the plaintiff claimed her dower out of the property in question. She might reasonably have supposed that she had no such claim; and we think that it would be unjust, under such circumstances, to order an account against them prior to the date of suit.

The decree, therefore, will direct an account of the profits to be taken in the usual way from that date.

Attorney for the appellant: Mr. H. C. Chick.

Attorneys for the respondents: Messrs. Dhur and Dhur.

(1) 1 Morley, 300; Morton by Montriou, 242.

Before Mr. Justice Wilson.

STEEL AND OTHERS v. ROBERTS.

1881
April 4.

Application on behalf of Arbitrators—Reference—Costs of Reference.

There is nothing in the Civil Procedure Code which authorizes arbitrators to apply to the Court for confirmation of an order passed by them, making payment of their fees a condition precedent to the hearing of a reference.

MESSRS. BARROW and DIGNAM, who were the arbitrators appointed in the above-mentioned suit to arbitrate between Mr. Steel and Mr. Roberts in certain matters which were known as the Ravelie, Burlah, Panicherra and Stainforth references, applied to the Court on motion, notice of which was duly served on the defendant's attorney, for confirmation of an order passed by them on the 21st March 1881.

It appeared that the arbitrators had given their award in the Ravelie reference in favor of the plaintiff, and that they had also made an award in the Burlah reference, and that the arbitrators' fees for attendance and preparing the latter award amounted to Rs. 8,349, which sum had not been paid; and that on the 30th September 1880, they gave notice to Messrs. Sanderson and Co., the plaintiffs' attorneys, that the award was ready and would be filed on payment of the arbitrators' fees. On the receipt of this intimation, Messrs. Sanderson and Co. wrote to Messrs. Remfry and Co., the defendants' attorneys, expressing their readiness to pay their clients' share, and suggesting that Messrs. Remfry and Co. should pay the defendants' share, and that the award should then be filed. Messrs. Remfry and Co. replied that it was the plaintiffs' duty to take up the award.

The arbitrators met on the 2nd March 1881, at which meeting both the plaintiffs and defendants were represented, and decided on passing the following order as to the undermentioned reference:

“Panicherra and Stainforth references.”

“Ordered, subject to the sanction of the Court being obtained, that, without prejudice to any order or award that may hereafter be made as to how the costs of these references and awards are to be hereafter paid or borne by the parties, the parties do pay

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the arbitrators' fees of these two references (to be fixed by the arbitrators) in equal shares,—that is to say, one-half by Messrs. Sanderson and Co.'s clients, and the other half by Mr. Remfry's clients; and that the arbitrators' fees for every subsequent meeting be paid by the parties in the same proportion before such meeting is opened. In the event of either party not paying the fees hereby directed to be paid, the arbitrators will proceed *ex parte* in the reference or references as to which default shall be made at the instance of the party who shall pay such fees. Messrs. Sanderson and Co. are directed to apply to the Court for the sanction required to the arbitrators' order; and the arbitrators direct that their costs of such application be costs of the reference, whatever may be the result." Mr. Remfry at this meeting protested against such an order, on the grounds that the deed of submission providing for the references contained no provision for prepayment of fees, and that no such condition precedent to the hearing of a reference could be made. The arbitrators, however, replied that cls. 1 and 3 of this agreement empowered the arbitrators to "regulate the proceedings," to which Mr. Remfry replied that such regulation referred only to the mode of proceeding and the reference in which matters were to be taken. The order was ultimately passed as set out above, and the matter came up before the Court on motion, asking for confirmation of the order.

Mr. *Allen* for the plaintiffs.

Mr. *Bonnerjee* for the defendants.

WILSON, J., decided that, where a matter is before arbitrators, it is out of the hands of the Court; that although the Civil Procedure Code gives power to the Court to interfere in various ways in arbitration matters, it makes no provision for such an application as the present. Such being the case, added to the fact that he considered that no sufficient reason for making the application had been advanced, the motion was dismissed with costs.

Application dismissed.

Attorneys for the applicants: *Sanderson and Co.*

Attorneys for the opposite party: *Remfry and Remfry.*

Before Mr. Justice Broughton.

JUGGUT CHUNDER ROY AND OTHERS (PLAINTIFFS) v. ROOP CHAND
SHAW AND OTHERS (DEFENDANTS).

1881
March 24.

Suit on Hathchitta—Partnership—Some Partners denying Debt, others admitting Debt—Costs as between Defendants.

In a suit brought against several partners to recover a sum of money on a hathchitta, some of the partners denied the debt and the partnership, whilst others admitted both the partnership and the liability; the Court found in favor of the plaintiffs, and gave them a decree for the amount sued for with costs, and ordered the defendants who had disputed the debt and the fact of the partnership, to pay the costs of the other defendants, who had admitted their liability.

JUGGUT CHUNDER ROY, Surut Chunder Roy, and Protab Chunder Roy, traders, sued the defendants (Roop Chand Shaw, Sonatun Shaw, and Rakhai Das Shaw (an infant), who were alleged to carry on business as “Nodear Chand, Roop Chand, Sonatun, and Tariney Pershad Shaw,”) for a sum of Rs. 2,750, principal, and Rs. 319-14-9, as interest up to 14th June 1880, due on a hathchitta, dated 2nd July 1879, signed by the defendants’ gomashtha Mohanundo Shaw, alleging that they had demanded payment, but that it had been refused.

Roop Chand denied the partnership, and denied the debt, and stated that Mohanundo Shaw had no authority to sign the hathchitta on his behalf. He further stated, that, some years ago, he had inherited, on the death of his father, a certain share in a business which had been carried on by his father in partnership with others, under the name of Chintaram, Nodear Chand Shaw, and that he had remained in the firm till June or July 1877, when he withdrew, and that since that time the business had been carried on, so far as he was concerned, for the purposes of being wound up.

Tariney Pershad Shaw and Chand Mohun Shaw admitted the partnership and the debt, and stated that they had always been ready to liquidate it, but that they had been prevented by their copartners.

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Mr. *Kennedy* and Mr. *T. A. Apear* for the plaintiffs.JUGGUT
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SHAW.Mr. *Bonnerjee* for the defendant *Roop Chand* and the second defendant.

Mr. *Dutt* for the third, fourth, and fifth defendants, contended that, having admitted the debt, he was entitled to his costs.

Mr. Justice *Broughton* found that the defendants were partners, and gave a decree in favor of the plaintiffs against all the defendants, and ordered *Roop Chand* to pay the costs incurred by *Tariney Pershad Shaw* and *Chand Mohun Shaw*, and the costs of *Rakhal Das* to be paid out of the partnership assets, after satisfaction of the debt.

Attorneys for the plaintiffs: *Mookerjee* and *Deb*.

Attorneys for the defendants: *Swinhoe & Co.* and *O. G. Gungooly*.

APPELLATE CIVIL.

Before Mr. Justice Cunningham and Mr. Justice Prinsep.

ACHUL MAHTA AND OTHERS (DEFENDANTS) v. RAJUN MAHTA
AND OTHERS (PLAINTIFFS).*

1881
March 9.

*Easement—Limitation, Plea of—Limitation Act (XV of 1877), s. 26—
Presumption of a Grant.*

In a suit to establish an easement when limitation is pleaded, the proper issues to frame under s. 26 of Act XV of 1877 (Limitation Act) are:—

(i) Whether the easement in question was peaceably, openly, and as of right, enjoyed by the plaintiff, or those through whom he claims, within two years of the institution of the suit; and

(ii) in the event of the above issue being found in the negative, whether there is evidence of enjoyment on the part of the plaintiff, or those through

* Appeal from Appellate Decree, No. 2297 of 1879, against the decree of *W. Cornell, Esq.*, District Judge of *Midnapore*, dated the 7th July 1879, reversing the decree of *Baboo Kalli Nath Dhur, Munsif of Contai*, dated the 29th June 1878.

whom he claims, of such a character and duration as to justify the presumption of a grant or other legal origin of the plaintiff's right independent of the provisions of Act XV of 1877, s. 26.

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THIS was a suit brought by the plaintiff Rajun Mahta, in the Court of the Additional Munsif of Contai, to establish his right of way over a footpath through the defendants' premises. He alleged, that he had been using the same for a period of upwards of fifty or sixty years prior to September 1877, and that the defendants had then wrongfully closed it up in execution of a collusive decree obtained in a suit to which he was not a party, although he had previously instituted criminal proceedings against them with reference to the obstruction of the path-way and been successful in getting it reopened. The defendants, amongst other pleas, raised that of limitation, alleging that the plaintiff had not enjoyed the easement within the period of two years before the institution of the suit. The Munsif having dismissed the case in the first instance, the plaintiff appealed to the Judge, who, in giving him a decree, observed, that he found no proof that there was any interruption (which was submitted to for one year) before December 1875, the plaintiff not only having contested the matter in the Criminal Court, but having also prosecuted the defendants, who were punished under s. 188 of the Penal Code in June 1876.

From this decree the defendants appealed to the High Court.

Mr. H. C. Mendies for the appellants.

Baboo Shooshi Bhoosun Dutt for the respondents.

The judgment of the Court (CUNNINGHAM and PRINSEP, JJ.) was delivered by

CUNNINGHAM, J.—In this case the plaintiff's cause of action is the forcible obstruction in September 1877 of a right of way through the defendants' premises, which the plaintiff alleges that he has peaceably and publicly used for upwards of fifty years. The original Court, finding that no easement was proved, and that any use made of the way by the plaintiff was permissive only, dismissed the suit.

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The lower Appellate Court, considering that the right of way two feet wide was proved, reversed the decision of the Munsif, and gave the plaintiff a decree. The objection, however, was taken, and is now urged before us in special appeal, that there was no proof of enjoyment within two years before the suit was brought, and that, accordingly, the right was barred under the 4th para. of s. 26 of the Limitation Act of 1877.

As to this point the Judge observes: "I do not find any proof that there was any interruption (which was submitted to for one year) before December 1875." This remark appears to refer to the explanation given in the section of an "interruption," and leaves indistinct the point whether, there had been an actual enjoyment of the plaintiff, or those under whom or in whose right he claims, within two years of the institution of the suit. We must, therefore, refer the following issues to the lower appellate Court.

1. Was the right of way in question peaceably, openly, and as of right, used by the plaintiff or those through whom he claims within two years of the institution of the suit? Supposing that it was not so enjoyed, and with reference to the alleged antiquity of the right and the observations of their Lordships of the Privy Council in *Maharani Rajroop Koer v. Syed Abdul Hossain* (1), we further direct the following issue:—

2. Is there evidence of enjoyment on the part of the plaintiff, or those through whom he claims, of such a character and duration as to justify the presumption of a grant or other legal origin of the plaintiff's right, independent of the provisions of s. 26 of the Limitation Act of 1877.

Case remanded.

(1) L. R., 7 I. A., 240.

SMALL CAUSE COURT REFERENCE.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Pontifex.

RAMBEBUK AND OTHERS (PLAINTIFFS) v. RAMLALL KOONDOO
(DEFENDANT).*

1881
Feb'y. 9 & 28.

Parties—Adding Plaintiffs in Actions of Contract—Nonjoinder—Joinder of Plaintiffs after time for bringing Suit has expired, Effect of—Co-Contractors—Limitation Act (XV of 1877), ss. 20 and 22—"Prescribed Period"—Procedure—Suit by Members of Joint Hindu Family carrying on Trade in Partnership.

Two of the sons out of a joint Mitakshara family, consisting of a father and three sons and the widow and sons of a deceased son, and carrying on business in partnership, sued to recover money due on a hatcheditta dated the 11th December 1876; the last payment made and entered by the defendant being on the 20th July 1877. No time was fixed for payment of the money, so that it became payable on the date of the hatcheditta.

The suit was instituted on the 19th July 1880, and came on for hearing on the 26th July, when an objection was taken, that all the parties who ought to sue were not on the record. On the application of the original plaintiffs the names of the father and the third son were then added, and the plaintiffs were described as surviving partners of the deceased son. At the time the additional plaintiffs were made parties, the suit was, as regards them, barred by limitation.

Held, that the additional plaintiffs were rightly made parties to the suit, notwithstanding that the suit was, as far as they were concerned, barred.

In actions of contract it is the right of the defendant, if he takes the objection in proper time, to insist upon all the persons with whom he contracted being joined as plaintiffs, and if, after the objection has been raised, the plaintiff proceeds with the suit without taking steps to add the person or persons whose nonjoinder has been objected to, and the Court finds that the objection is well founded, the suit must be dismissed.

That, inasmuch as the original plaintiffs could only enforce their claim in conjunction with the added plaintiffs, and the added plaintiffs were barred by s. 22, of Act XV of 1877, the claim of the original plaintiffs was also barred.

Boydonath Bag v. Grish Chunder Roy (1) dissented from.

* Case referred for the opinion of the High Court under s. 7, Act XXVI of 1864, by H. Millet, Esq., and Baboo Koonjo Lal Banerjee, the First and Second Judges of the Calcutta Small Cause Court.

(1) I. L. R., 3 Calc., 26.

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That the suit, if all the plaintiffs had originally joined in suing, would not have been barred by s. 20 of Act XV of 1877. The words "prescribed period" in that section mean, not the period prescribed for the payment of the debt, but the prescribed period of limitation.

There is no equity, but often much injustice, in allowing one joint-contractor out of many to sue a defendant, notwithstanding an objection duly made by the latter; and the Court has no right to allow one contractor to recover under such circumstances, though he may no doubt afterwards adjust the sum which he recovers with his co-contractors.

As between the members of a joint family, any one or more may be authorized by the rest to act as their agent or agents in any business transaction; but when a joint family or any members of it carry on a trade in partnership, and contract with the outside public in the course of that trade, they have no greater privileges than any other traders. If they are really partners, they must be bound by the same rules of law for enforcing their contracts in Courts of law as any other partnership.

THE facts of this case fully appear from the referring order, which was as follows:—

"This suit was originally instituted against the defendant on the 19th July 1880. It is based upon a hatchitta dated the 2nd Pous 1283, corresponding with the 11th December 1876, for recovery of Rs. 529-1 as principal and interest. The suit was originally instituted by Ramsebuk and Sewrutton Chand, residing in Calcutta, describing themselves as carrying on business under the firm of Sew Churnlall Luchmondeen. The case came on for hearing before the First Judge, on the 26th July last, when the defendant pleaded misjoinder of parties, though properly speaking, it ought to have been nonjoinder of parties. Accordingly, on the application of the first two plaintiffs on the record, the names of the other two plaintiffs, Sew Churnlall and Bhogowandeen, were added, with the additional description of surviving partners of Luchmondeen, the name and style of the firm Sew Churnlall Luchmondeen being still retained. These parties were added, subject to the objection then taken by the defendant, leave being granted to him to raise the same objection at the hearing. Sew Chutnlall is the father of the other plaintiffs, one other son, Luchmondeen, having died some four years ago. At the time the new plaintiffs were added, the suit as regards them was barred by limitation. The First Judge being of opinion that the suit in this form could not proceed,

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dismissed it. Against this decision an application for a new trial was filed, and admitted by us. Treating the new trial suit as a fresh one, the defendant put in the following pleas:—Deny plaintiff's right to sue, limitation, and never indebted. No plea was recorded on the ground of nonjoinder of parties. With the defence thus recorded we have tried the suit *de novo*. So far as we could understand the nature of the objection touching the plaintiff's right to sue, it was based on the ground of the names of the two last joined plaintiffs, Sew Churnlall and Bhogowandeen, being added after their right to institute the suit was barred by limitation, and the two other plaintiffs being legally incompetent to maintain the suit, and the names of the heirs of Luchmondeen not being added as plaintiffs. We are of opinion, that the persons who have been joined together as plaintiffs are *prima facie* the proper parties to maintain the suit, as they are the persons who are interested in the subject-matter of the suit, and with whom virtually the original contract was made by the defendant. As regards Luchmondeen's heirs, his widow and sons not being made parties to the suit, we do not consider it absolutely necessary that they should be impleaded either as plaintiffs or defendants: *Firstly*, because even if the widow, under the Mitakshara law which governs the case, had a right as well as her sons, they were members of a joint undivided Hindu family living in commensality (where each member acts as an agent for the others), and were fully represented by the surviving partners, who, when there is a change in the partnership, are the proper persons to sue and be sued in respect of all contracts made by or with the firm (Lindley on Partnership, 4th Edition, p. 490). *Secondly*, because, in the absence of a statutory provision, this has been the procedure in such suits recognised by the existing practice of this Court. We have next to consider whether the suit of the two first plaintiffs is also barred. We are satisfied that the law never intended it to be so. The very words of s. 22 of Act XV of 1877 are quite against such a construction. The words of the section are: "the suit shall, as regards him, be deemed to have been instituted when he was so made a party." This is very plain language, obviously meaning that it is not intended to

1881 affect a plaintiff who has instituted his suit within time. This
 RAMSEBUK is the view taken by Mr. Justice Markby in *Boydonath Bag v.*
 v. *Grish Chunder Roy* (1) of the identical words in s. 22 of Act
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 sent Limitation Act, though it is true, Prinsep, J., differed from
 him. Another point has been raised by the defendant's pleader.
 He argues, that as the payments were not made within the pre-
 scribed period for payment, this suit is even against all the
 plaintiffs barred by limitation. The hathchitta on which the
 suit was brought is for Rs. 460-8, and is dated the 11th Decem-
 ber 1876 (2nd Pous 1283). The payments made and entered
 by the defendant in it were as follows:—

2nd January 1877 (19th Pous 1283)	...	...	Rs. 50
11th April 1877 (30th Choitro 1283)	...	...	Rs. 40
20th July 1877 (6th Srabun 1289)	...	...	Rs. 40
<hr/>			
Total	...	...	Rs. 130

“The suit was instituted on the 19th July 1880, only one day within time if the last payment on the 20th July 1877 gives rise to a new period of limitation.

“No time is fixed for the payment of the money, so it becomes due on the date of the hathchitta, viz., the 11th December 1876. The argument is, that the words in s. 20 of Act XV of 1877, “before the expiration of the prescribed period” refer, not to the prescribed period of limitation, but to the period prescribed for the payment of the debt. This argument is derived from the fact that, in other sections of the Act, the words used are, “before the expiration of the prescribed period for the suit” (s. 19), or “in computing the period of limitation prescribed for any suit, appeal, or application” (s. 12), or some such words; and that accordingly “the prescribed period” in s. 20 does not mean the prescribed period of limitation, but the period prescribed for the payment of the debt. In our opinion, however, they mean the prescribed period of limitation, although the section does not expressly refer to suits. Reading s. 20 together with s. 4 of the Act, which is the section that prescribed the different periods of limitation for different descrip-

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tions of suits, the words "prescribed period" in s. 20 have, we think, reference to s. 4 and the second schedule of the Act. The words "prescribed period" alone are obviously used for the purpose of conciseness, as it will be found that they are similarly used in illustration (b) of s. 4 of the Act, while there can be little doubt about their meaning in the illustration referred to: We may further remark that Mr. Ninian Thompson has also put a similar construction upon the same words used in s. 20 of Act IX of 1871 (*vide* page 17 of his supplement to a commentary on Act XIV of 1859). Again, if the argument of the defendant's pleader is a sound one, s. 20 will only apply to debts payable at some date subsequently to the date on which they were contracted, and not to debts payable on demand. Indeed, payments made in respect of a debt to become due, would not be a payment of a debt. If money is borrowed on the 1st January, and it is agreed that it shall be repaid on the 1st February, strictly speaking there is no debt till the 1st February. Then again it could not give rise to a new period of limitation, for the limitation would run, not from the date of payment, but from the date the debt became due, such as the 1st February. In other words, if the argument is a good one, the section is wholly infructuous. Such cannot, we think, have been the intention of the Legislature. We have next to decide whether the two plaintiffs who instituted this suit can recover judgment against the defendant for the entire claim. We are of opinion, that either as partners, or as members of a joint undivided Hindu family, they have a right, at least to some portion of the money sued for, though what that proportion is we cannot decide. We see, however, no reason why the two plaintiffs who originally instituted the suit should not succeed in respect of the entire claim. We are of opinion, that each member of a joint undivided Hindu family, and every partner of a partnership, is an agent for the other members or partners. A firm so constituted in the name under which a suit is originally brought and maintained, represents the whole family. A joint undivided Hindu family is a little commonwealth, in which every member works for the common good. The earnings and the acquisitions of property by each member, wherever made, are the

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earnings and acquisitions of the whole family, and their interests in all respects are identical; and if the members are individually capable of acquiring property for the use of the whole family, they can certainly sue and be sued individually. The two partners or plaintiffs, at the time they instituted the suit, were alone in Calcutta, and the two others in Lucknow. In one sense, therefore, these two partners can fairly say that they alone carried on the business in Calcutta in the name of the firm, quite irrespective of the two other partners, and in point of fact they actually did so; they, therefore, sought to recover the money in the name of the firm, which included all the partners, in respect of an entire and indivisible contract. The Court has power, under s. 26 of the Civil Procedure Code, extended to this Court, to give judgment for one or more of the plaintiffs who may be entitled to relief; and under s. 32 of the aforesaid Code, we can also strike out the names of any plaintiff who may have been improperly joined. The hathchitta given by the defendant to the plaintiff Ramsebuk was joint, and did not specify shares; the money due under it was payable collectively, and not distributively; and as the defendant has no defence on the merits, we are of opinion that, in the interests of justice, there should be a judgment for the two first plaintiffs who instituted the suit, for the whole amount of the claim. Both sides have asked us to refer certain questions to the High Court, and as we think that they are important, we are quite willing that they should be referred to a higher tribunal. The questions referred, which are in nearly the same language as those given to us by the defendant's pleader, are:—

“ 1. Whether, upon the findings arrived at by the Court, the claim of the plaintiffs is barred, because the names of the two plaintiffs were added to the plaint after the suit as against them was barred ?

“ 2. Whether the Court, on the application of the first two plaintiffs, had power to add the names of the third and fourth plaintiffs, the defendant having objected that the suit, so far as the third and the fourth plaintiffs were concerned, was barred ?

“ 3. Whether or not the suit is not altogether barred, having regard to the terms of s. 20 of the Indian Limitation Act of 1877 ?

"4. Whether the first and second plaintiffs, having by their own application made the third and fourth plaintiffs parties, can ask the Court to give them (the first and second plaintiffs) a judgment separately from the third and fourth plaintiffs?

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"5. Can the Small Cause Court enter into the equitable rights of the plaintiffs as between themselves? or is not the Small Cause Court a Court of Equity for defendants only in terms of s. 25 of Act IX of 1850, by which legal claims or demands are permitted to be brought into Court with permission to the defendants to plead equitable defences?

"6. Whether the view taken by the Court of the right of the plaintiffs as joint members of an undivided Hindu family, or as members of a trading partnership *re* their debtor, is correct? Contingent upon the opinion of the High Court our judgment is for the full amount sued for in favor of the two first plaintiffs alone, and the suit is dismissed as against the last two plaintiffs."

Mr. R. Allen for the plaintiffs.—The suit is not barred with respect to the original plaintiffs. Section 22 of Act XV of 1877 only provides that the suit should be barred with respect to the party joined. This would not affect the original plaintiffs, as the right still remained in the others, though the remedy was gone: *Boydounath Bag v. Grish Chunder Roy* (1), which was decided on similar words in s. 22 of Act IX of 1871. [GARTH, C. J.—Then a plea of nonjoinder would be of no use.] It is practically done away with, it only entails adjournment. [GARTH, C. J.—The defendant may have a right of set-off, which possibly he would not be able to avail himself of, unless all the plaintiffs were joined. PONTIFEX, J.—Must there not be a proper institution of a suit to save plaintiffs from being barred by limitation—just as an incomplete acknowledgment is not sufficient—and can the suit be said to be properly instituted, unless all the parties who ought to be plaintiffs are before the Court?] The suit is sufficiently complete to save the bar of limitation; the whole debt is due to each of the plaintiffs, and if one is allowed to recover, there is no injustice done to the

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defendant. Section 26 of Act X of 1877 provides, that the Court may give judgment for such one or more of the plaintiffs as may be found entitled to relief. This section is made applicable to the Presidency Small Cause Courts. [PONTIFEX, J.—Here the added plaintiffs were only before the Court for the purpose of being dismissed as being barred.] It is submitted they are before the Court in a suit, and the Court could act under s. 26. Then it is submitted, the original plaintiffs can sue as agents for, and on behalf of, the other members of the joint family. [PONTIFEX, J.—If you put their right to sue on the ground of their being a Mitakshara family, you must show that a kurta may sue alone without joining the adults.] The original plaintiffs are agents of the other members; they are the only members residing in Calcutta: it is submitted they can sue alone: *Gocool Doss v. Tejram* (1), decided on the 24th January 1879 by Wilson, J. [PONTIFEX, J.—That was only as to surviving partners.] See *Kelsal v. Gopaul Doss* (2). These plaintiffs can bind the others, therefore, they can sue alone. See Lindley on Partnership, 491; *Agacio v. Forbes* (3). Under s. 20 of Act XV of 1877, the original plaintiffs are not barred, the words “prescribed period” mean the prescribed period of limitation, not the period fixed for payment of the debt. The contrary has been decided in *Tariney Churn Nundy v. Shaikh Abdur Rohoman* (4); but that construction would make the section useless and unmeaning, as the learned First Judge shows in the reference, and it is submitted that decision is not correct.

Mr. Piffard for the defendant was not called on.

The opinion of the Court was delivered by

GARTH, C. J.—Before answering *seriatim* the questions referred to us, I think it necessary to explain what I consider to be the law with regard to the nonjoinder of plaintiffs in actions of contract. This explanation will of itself afford an answer to most of the questions referred. In actions of contract, it is the right of the defendant, if he takes the objection

(1) Unreported.

(3) 14 Moore's P. C., 160.

(2) 1 Taylor and Bell, 338.

(4) 2 C. L. R., 346.

in proper time, to insist upon all the persons with whom he contracted being joined as plaintiffs; and if, after the objection has been raised, the plaintiff proceeds with the suit without taking steps to add the person or persons whose nonjoinder has been objected to, and the Court finds that the objection is well founded, the suit must be dismissed. It is for this reason that the nonjoinder of plaintiffs in an action of contract has always been a plea in bar; and the justice of the rule is manifest. If a defendant is sued by one only of two persons with whom he has contracted, he may have a set-off, or any other defence *against the two*, of which he could not avail himself *as against the one only*; and besides this, the defendant ought always to be in a position to recover his costs, if he succeeds, *as against all the parties* with whom he contracted. In the present case the two original plaintiffs yielded at once to the defendant's objection; and the Court very properly, upon their application, allowed the two other plaintiffs to be added. But then the 22nd section of the Limitation Act presented a new difficulty to the plaintiffs, and upon this the main question in the case depends. In England, since the passing of the Common Law Procedure Act of 1852, the amendment might have been made, if the Court thought proper, so as to protect the claim of the plaintiffs from limitation, because, after the amendment, the suit would be considered as having been commenced by all the plaintiffs at the time when it was first instituted. If the Court had reason to believe that all the plaintiffs had not been joined for some improper motive, the amendment would be refused; but if it considered that the nonjoinder was a *bond fide* mistake, the amendment would be made, for the express purpose of protecting the plaintiffs' rights, and of preventing the Limitation Act from working injustice. (See *Lakin v. Watson* (1), *Brown v. Fullerton* (2), and cases there cited *at p. 556 of the Report.) But the policy of the Legislature in this country has been to make the law of limitation much more strict than in England, and to take away, as far as possible, any discretion from the Courts to modify its strictness. The provisions of s. 22 of the Limitation Act seem to have been passed

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* (1) 2 Cr. & M., 685.

(2) 13 M. & W., 556.

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with the avowed object of preventing such amendments being made in such a way as to relieve the plaintiffs from limitation ; and the effect of those provisions in such a case as the present is to render the amendment virtually useless to the original plaintiffs. If those plaintiffs cannot enforce their claim without joining the additional plaintiffs, and the additional plaintiffs are barred from enforcing it by the law of limitation, it is obvious that the suit must fail. The lower Court seems to have supposed, that the original plaintiffs ought in equity to succeed, although their co-contractors may be barred. But this would be directly at variance with the rule of law, which requires that all co-contractors should join in such a suit, and it would place it in the power of one or more of several plaintiffs (co-contractors) to render any objection by the defendant on the ground of nonjoinder ineffectual ; because, by bringing their suit at the very last moment, to save limitation, they might always prevent their co-contractors being usefully joined, and so secure the judgment of the Court themselves to the exclusion of their co-contractors. We have been referred in the course of the argument to the case of *Boydonth Bag v. Grish Chunder Roy* (1), in which Mr. Justice Markby appears to have held, that, under circumstances similar to the present, the two original plaintiffs would be entitled to a decree, though their co-contractors were barred. I confess I cannot understand, nor agree with that decision ; and if Mr. Justice Prinsep had concurred in that view, I should have thought it right to refer the question to a Full Bench. But as I understand, Mr. Justice Prinsep decided the appeal upon another ground. Of course, if in this case it had been found in the Court below as a fact, that the contract was made *between the defendant and the two original plaintiffs only*, there would be no difficulty in deciding in their favor, because then the joinder of the two other plaintiffs would only have been a *misjoinder*, which by s. 31 of the Code of Civil Procedure is never now fatal to a suit (2). That section is a reproduction of s. 19 of the Common Law Procedure

(1) I. L. R., 3 Cal., 26.

tended to the Presidency Small Cause Courts.—*Rep. note.*

(2) Section 31 of the Civil Procedure Code has, however, not been ex-

Act, 1860, and applies (for good reasons) to cases of *misjoinder* only. There can never be any injustice in allowing *too many plaintiffs* to sue together, or in allowing them to frame their suit either jointly or severally, or in the alternative, because the defendant in such a case can always set up different defences against different plaintiffs, and is in a position to obtain his costs from all or any of them, against whom he may succeed. The Court can always dismiss a suit against one or more plaintiffs without difficulty or injustice, and without incurring any of the objections which are applicable to the case of nonjoinder. Thus, for instance, suppose that three persons, *A*, *B*, and *C*, sued *D* upon a contract, and *D*'s defence was, that he made the contract with *A* and *B* alone, and that as against them he has a set-off. Then, if all the three plaintiffs succeeded in proving their case against the defendant, he would be defeated, because, as against the three, he would have no right of set-off. But if, on the other hand, the defendant proved that he made the contract with *A* and *B* only, the suit would be dismissed as against *C*, and *D* would probably get his costs against him; but as regards *A* and *B* the question of set-off would be tried, and the defendant would succeed or not according as he proved that plea. This is the reason why both by the Common Law Procedure Act of 1860 and the Indian Code of Civil Procedure, misjoinder of plaintiffs can never be fatal to a suit, though nonjoinder of plaintiffs may. Now, as I understand, the lower Court has found in this case, that all the four plaintiffs were partners in the concern, and that the defendants contracted with all jointly, and it is difficult to see how upon the facts the Judges could have come to any other conclusion. The assets of the firm were the joint property of all the partners; the firm was conducted with their joint moneys; and the business appears to have been carried on by the acting partners on behalf of all the four. If I considered that there was any room for doubt as to this point, I should be disposed to send the case back to the Court below to have it reconsidered; but as the original plaintiffs declined to raise that question upon the defendants' objection, I think, that if the case went back, it could only be at the plaintiffs' cost.

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Having thus explained what I consider the law to be as applicable to the case, I will proceed to answer the questions referred to us *seriatim*:—

1. I think that the claim of the original plaintiffs is barred, because they can only enforce their claim in conjunction with the other plaintiffs, and the other plaintiffs are barred by s. 22 of the Limitation Act.

2. It was in the discretion of the Court to add the names of the third and fourth plaintiffs, and I think that, under the circumstances, they were right in so doing.

3. The suit, in my opinion, would have been in time if all the plaintiffs had joined in the first instance. I quite agree with the learned Judges of the Small Cause Court that the words "prescribed period" in s. 20 means, not the period prescribed for the payment of the debt, but the prescribed period of limitation. We were referred to the case of *Tariney Churn Nundy v. Shaikh Abdur Rohoman* (1), in which a contrary view appears to have been entertained; and if it was necessary for the purpose of this case, we should refer the point to a Full Bench. But having regard to our judgment upon the other point, it is not necessary.

4. For the reasons already given, I think that the first and second plaintiffs are not entitled to the judgment of the Court.

5. There is no equity, in my opinion, but often much injustice, in allowing one joint contractor out of many to sue the defendant, notwithstanding an objection duly made by the latter; and the Court has no right to allow one contractor to recover under such circumstances, though he may no doubt afterwards adjust the sum which he recovers with his co-contractors.

6. As between the members of the joint family, any one or more may, of course, be authorized by the rest to act as their agent or agents in any business transaction; but when a joint family, or any members of it, carry on a trade in partnership, and contract with the outside public in the course of that trade, they have no greater privileges than any other traders. If they are really partners, they must be bound by the same rules

of law for enforcing their contracts in Courts of law as any other partnership. The defendant will have the costs of this reference.

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Attorney for the plaintiffs : *Mr. Hart.*

Attorney for the defendant : *Mr. E. O. Moses.*

APPELLATE CIVIL.

Before Mr. Justice Morris and Mr. Justice Tollenham.

DWARKANATH PAL AND OTHERS (DEFENDANTS) *v.* GRISHCHUNDER
 BUNDOPADHYA AND OTHERS (PLAINTIFFS).^{*} 1881
 March 11.

Suit to cancel Undertenures—Parties—Act XI of 1859, s. 37.

On the 13th January 1871, *A* and *B* purchased an estate sold for arrears of Government revenue. The original proprietors asserted their right to collect the rents of a portion of the property by virtue of holding two shikmi talooks and a howla tenure. This right was affirmed by the High Court in April 1875. *B* had previously sold his interest to *C*. On the 29th May 1876, *A* created a patni of his eight annas in favor of *D* and *E*, and on the 4th July 1876, *C* purchased all the rights of the original proprietors. On the 18th January 1877, *A* sued under Act XI of 1859, s. 37, to cancel or vary the tenures, making the original proprietors, *C*, and various tenants defendants. *C* objected that *A* had no right of suit or cause of action, as he had parted with all his rights to *D* and *E*; and that as his entire interest in the estate was only eight annas, he could not sue to cancel a part only of the sub-tenures. *D* and *E* then applied to be added as parties, and were made plaintiffs.

Held, that *A* had no cause of action, as he had previously parted with all his rights as zemindar, to cancel these tenures in favour of *D* and *E*, nor could *D* and *E* sue, as they were not "purchasers of an entire estate." That *A* having no cause of action it was not competent to the lower Court to add *D* and *E* as plaintiffs, and so introduce a right of action which did not previously exist; and

^{*} Appeal from Appellate Decree, No. 1391 of 1879, against the decree of J. C. Geddes, Esq., Judge of Tippera, dated the 29th March 1879, affirming the decree of Baboo Uma Churn Kastogiri, First Subordinate Judge of that District, dated the 19th February 1878.

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That, even on the assumption that *D* and *E* were properly made plaintiffs, the lower Appellate Court should have taken into consideration certain admissions made by them as to the existence of the undertenure, both before and after the Government sale.

Sreemunt Ram Dey v. Kookoor Chund (1) followed.

MR. *Jackson* and Baboo *Kashī Kant Sen* for the appellant.

Baboo *Srinath Doss* and Baboo *Byhant Nath Doss* and Mun-
shee Serajul Islam for the respondents.

The facts of this case sufficiently appear from the judgment of the Court (*MORRIS* and *TOTTENHAM, JJ.*), which was delivered by

MORRIS, J.—This suit was instituted by one Grish Chunder Bundopadhyia, one of two auction-purchasers, who, on the 13th January 1871, jointly purchased the estate, Talook Sributso Doss, when it was put up to sale for arrears of Government revenue on the default of the proprietors, Raj Coomar Bose and Dino Nath Bose. After their purchase, the auction-purchasers found themselves unable, in four villages of the property, to realize rent direct from the ryot-cultivators, owing to the opposition of the former proprietors, the Boses, who asserted their right to collect the rent in virtue of holding certain intermediate tenures in the shape of two shikmi talooks and one howla tenure. Various suits for rent were instituted against the ryot-cultivators, either by the Boses as plaintiffs, in which the auction-purchasers intervened, or *vice versa* by the auction-purchasers as plaintiffs, in which the Boses intervened. The litigation was carried up to the High Court, and the final result in April 1875 was to establish the existence of these undertenures and to declare the right of the Boses to collect the rent from the ryot-cultivators. But in February 1875, or about a month and-a-half before this decision, Brijnath Roy, the coparcener of Grish Chunder Bundopadhyia, sold his interest in the property to certain persons, who may be called generally the Pals. Then, on the 29th May 1876, Grish Chunder Bundopadhyia created a patni of his eight annas share of the pro-

perty in favor of two persons, Kali Coomar Dutt and Nil Komul Dutt; and on the 4th July 1876, one of the Pals, the appellant now before us, purchased, under a deed of sale of that date, all the rights and interests of the Boses in the three intermediate tenures which they set up. The effect of the last purchase was, to throw the estate practically into the hands and under the control of the Pals; and hence, on the 18th January 1877, Grish Chunder Bundopadhya brought the present suit to cancel or avoid these subordinate tenures. He made defendants the Boses, the Pals, and the various tenants whose rents he had failed to recover in the previous rent-suits.

The principal defendant, No. 3, who is the present appellant, at once objected that Grish Chunder Bundopadhya had no right of suit or cause of action, as he had parted with all his rights to the patnidars, Nil Komul and Kali Coomar Dutt; and further that as his entire interest in the estate amounted to an eight-anna share, he could not sue to cancel a part only of these subordinate tenures. He took other objections, which it is not necessary now to mention. But the result of the first objection taken in his written statement was, that the patnidars, Nil Komul and Kali Coomar Dutt, made an application to the Court to be added as parties to the suit, and to this the Court acceded by an order dated April 21st, 1877. The suit was then tried on its merits, and the Subordinate Judge dismissed the claim of Grish Chunder Bundopadhya with costs, but gave a partial decree in favor of the patnidars, dismissing their claim in respect to the two shikmi talooks, but directing the cancellation of the howla tenure. Against this order Grish Chunder Bundopadhya and the patnidars appealed, and a cross-appeal against the decision regarding the howla was preferred by the defendants. The District Judge dismissed the appeal of the defendants, and decreed the claim of the three plaintiffs in full, and it is this order which forms the subject of the present appeal.

Three points are urged before us in this appeal: *First*, that as Grish Chunder Bundopadhya, who instituted the suit, had no cause of action, he having previously parted with all his rights as zemindar, to cancel these tenures in favor of the patnidars, Kali Coomar and Nil Komul Dutt: his suit ought to have been

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at once dismissed. *Second*, that, when no right of action lay in Grish Chunder Bundopadhya, the Court could not add the patnidars as plaintiffs to the suit, and so introduce a right of action which did not before exist; and *third*, that even on the assumption that the patnidars were properly made co-plaintiffs, the lower Appellate Court should have taken into consideration certain admissions made by them as to the existence of these under-tenures both before and after the Government sale of the property.

We think that, on all these points, the appellant must succeed. On the first point the Judge considers the Subordinate Judge to be in error in holding Grish Chunder Bundopadhya, by his assignment of his rights as zemindar to the patnidars, to have no longer any right to deal with under-tenants of those patnidars; and the reason he gives is this: "The grantor of a patni is bound to warrant his patnidars in the enjoyment of his patni as granted; and the zemindar has a right to see that there are assets available to the patnidar, wherewith the patnidar may meet his half-yearly liability." But there appears to be some confusion of thought in this argument. There is no question that the patnidars received the property covered by the patni lease in exactly the same state as the zemindar had held it. And if the patnidars could not meet their half-yearly liability,—that is, pay the rent reserved,—the course for the zemindar to pursue was, not to bring suits against under-tenants, which the patnidars alone have the right to bring, but to enforce their liability by bringing the patni to sale under the provisions of the patni law. That the patnidar alone can bring a suit such as the present; and that the zemindar having given away his rights in patni cannot do so, has been expressly declared by a Bench of this Court in the case of *Sreemunt Ram Dey v. Kookoor Chund*.⁽¹⁾ Their Lordships say: "We think there is no doubt whatever that an auction-purchaser can sue within twelve years of the date of his purchase to recover any land that was originally included within the estate sold for arrears of revenue. When he created a patni in favor of the present plaintiff, it is quite clear that he could not sue to annul an undertenure within that patni, and

that no one but the patnidar could do so." From this the second point taken in appeal follows, as a necessary consequence, *viz.*, that when Grish Chunder Bundopadhyia had no right of action against the defendants, he could not mend his case by joining as parties to the suit other persons, the patuidars, who had a right of action against them.

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But, independently of these considerations, it seems to us that the plaint was bad on the face of it, and ought to have been dismissed. We understand the suit to be one brought by an auction-purchaser to avoid certain undertenures under the provisions of s. 37, Act XI of 1859. No doubt, the plaintiff alleges that these undertenures are fictitious, and have been set up in fraud simply to deprive the auction-purchaser of the benefit of his purchase; but clearly this allegation cannot be maintained in the present suit. It was an allegation which ought to have been made, and doubtless was made, in the various suits for rent to which the present plaintiffs and defendants were parties. The effect of these suits was to declare the Boses entitled to collect the rent. Decrees were passed on the basis of the proof adduced by the Boses that, as undertenure holders, they had previously collected the rent. The only ground, therefore, on which the plaintiff could bring this suit was that stated by him in the latter portion of his plaint, *viz.*, that none of these subordinate tenures were created at the time of the Permanent Settlement and comprised within the talook (Sributso Doss), and that the present talook devolved on him "free from all encumbrances." This being so, we are of opinion, that neither Grish Chunder Bundopadhyia as one of the original auction-purchasers, nor subsequently the patnidars to whom he assigned his rights, could bring this suit, inasmuch as, in the language of s. 37, Act XI of 1859, they were not "purchasers of an entire estate." By their own showing they purchased only an eight-anna share. Before proceeding, therefore, to avoid undertenures comprised within the estate under the power granted to them by that Act, it was necessary to join the co-purchaser as co-plaintiff in the action. But admittedly the co-purchaser, who is now, as found by the District Judge, represented by the Pals, of whom the present appellant is one, refuses to do anything of

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the kind. This section of the Act is of a penal character. It presses hardly upon persons who may have rights of long standing, and was enacted simply for the purpose of protecting the Government revenue. It must, therefore, be construed strictly. But just as the law vests "the proprietor" of an estate with power to measure the lands of such estate, and our Courts have repeatedly held that no sharer only can be treated as a proprietor to enforce this right, so here we think we must hold that one of two joint auction-purchasers, who, without the consent of his co-sharer, brings a suit to avoid undertenures within the estate purchased by them, cannot be recognised as an "auction-purchaser of an entire estate" within the meaning of s. 37 of the Act.

On all these grounds, therefore, we reverse the judgment of the Court below, and dismiss the suit of the plaintiff with costs in all Courts.

Appeal allowed.

CRIMINAL REFERENCE.

Before Mr. Justice Pontifex and Mr. Justice Field.

1881
March 9.

THE EMPRESS v. NUDDIAR CHAND SHAW, Accused.*

Excise—Sale by wholesale—Sale by Servant—Beng. Act VII of 1878, ss. 15, 59, and 60.

A sale of more than twelve quart bottles, or two gallons of spirituous or fermented liquors of the same kind, made at one transaction, is a sale by wholesale.

Quære.—Whether a sale of twelve quart bottles of one kind of liquor, and three quart bottles of another kind, at the same time, comes within the prohibition in the explanation clause of s. 15.

The licensed retail vendor himself is the only person liable to conviction under s. 60.

THIS was a reference made to the High Court under s. 296 of the Criminal Procedure Code.

* Criminal Reference, No. 33 of 1881, from the order of J. P. Grant, Esq., Sessions Judge of Hooghly, dated the 28th February 1881.

One Nuddiar Chand Shaw, a servant of a licensed retail vendor of imported liquors, sold to an informer, twelve quart bottles of beer and three quart bottles of brandy (the sale of the two sorts of liquor being completed in one transaction). On these facts being proved, the Joint Magistrate of Howrah convicted Nuddiar Chand of an offence under s. 60 of Beng. Act VII of 1878 for having sold excisable imported liquor by wholesale, and sentenced him to pay a fine of one hundred rupees.

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On the case coming up before the Sessions Court, the Judge was of opinion that the facts proved, did not amount to an offence under s. 60 of the Act, for that the sale of two distinct quantities of different liquors, although in total exceeding two gallons, did not amount to a wholesale sale within the meaning of the Act. He further added, that the transaction was one which was prohibited by s. 15 of the Act and by the conditions of the license held by the convicted person's employer, and as such, would be punishable, under s. 59 of the Act, with a fine of Rs. 50; but the offence could not be brought under s. 60. He further was of opinion that the conviction was bad, inasmuch as it had been had upon *the servant of the vendor*, whereas the last clause of s. 59 made the vendor alone responsible. He therefore referred the case for the opinion of the High Court.

No one appeared at the hearing.

The opinion of the Court (PONTIFEX and FIELD, JJ.) was given by

PONTIFEX, J.—The accused has been convicted under s. 60 of "The Bengal Excise Act," VII (B. C.) of 1878. This section enacts that "every licensed retail vendor who sells by wholesale . . . shall be liable for every such offence to a fine not exceeding two hundred rupees."

The Sessions Judge is of opinion that the conviction is bad: (1) because the sale of twelve bottles of beer and three bottles of brandy at the same time, is not a sale by wholesale; and (2) because the person convicted is not a retail vendor, but the servant of such a vendor.

We think that the Sessions Judge is right in his view of the law as to the second point.

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As to the first point, there is more room for doubt. Under s. 15 of "The Bengal Excise Act," the sale of a larger quantity of spirituous or fermented liquors than twelve quart bottles would be a sale by wholesale. If, therefore, more than twelve bottles of beer or of brandy, *i. e.*, of the same kind of liquor, had been sold at one transaction, this would be a sale by wholesale. In this case two kinds of liquor were sold, and the quantity of neither kind exceeded twelve bottles. The case of such a sale is provided for by a clause of the 15th section, which is in fact an explanation, *viz.*, "Under this section a sale of an assortment of spirituous or fermented liquors in greater quantity than is specified above, by a licensed retail vendor, is prohibited." If this provision stood alone without any other provision following or qualifying it, the sale in the present case would probably be within the prohibition. The section then goes on to enact:—"The Board may, by rule, define what shall be held to be an assortment for the purposes of this section." So far as we have been able to discover, there is no evidence that the Board have made a definition of "an assortment" from which would be excluded such a sale as that in this case—a sale, that is, of twelve bottles of beer and three bottles of brandy. This being so, the sale in question probably comes within the prohibition in the explanation clause above referred to, but for the decision of this case it is not necessary to determine this point, as we think that, upon the second ground, the convictions must be reversed.

We are clear that the licensed retail vendor himself is the only person liable to the penalty provided by s. 60, and that the servant of such vendor is not liable to conviction under this section.

We set aside the conviction of Nuddiar Chand Shaw had under s. 60 of "The Bengal Excise Act," acquit him, and direct that the fine, if realized, be refunded.

Conviction set aside.

APPELLATE CRIMINAL.

Before Mr. Justice Pontifex and Mr. Justice Field.

IN THE MATTER OF GOBIND CHUNDER MOITRA (PETITIONER)
v. ABDOOL SAYAD AND OTHERS (OPPOSITE PARTY).*

1881
March 4.

Criminal Procedure Code (Act X of 1872), ss. 491, 530—Dispute likely to cause Breach of the Peace—Decision on Title by Civil Court—Police Report—Incorporation of, by Reference.

On the 20th of March 1879, A applied to have certain lands, which he had lately purchased, registered in his name. The order of the Deputy Collector, declaring that A had proved possession, and was entitled to registration, was not passed until the 24th December 1879. Prior to A's purchase, B and C had, on the 6th March 1879, obtained registration of the same property. The proceedings were sent to the Commissioner, who, on the 29th September 1880, declared A to be entitled to the land; and in October the registration in the names of B and C was cancelled, and A's name was finally registered. In July 1880, proceedings under s. 530 of the Criminal Procedure Code were commenced upon the petition of certain ryots, who alleged that other ryots, at the instigation of A, were going to do acts which would lead to a breach of the peace. The Deputy Magistrate, the same person who as Deputy Collector had decided the land-registration case in favor of A, proceeded under s. 530 to consider the question as to who was in possession, and found that B and C were in possession.

Held, that the Deputy Magistrate could not, in these proceedings, set aside the order which he had made in the registration-case, as that order could only be set aside in a regular suit.

The proceedings recorded by the Deputy Magistrate did not set forth in express language that he was satisfied that a dispute likely to create a breach of the peace existed in respect of the land in question, between A on the one side, and B and C on the other; nor did it set forth the grounds upon which he was so satisfied that such dispute existed.

Held, that the proceeding was therefore defective.

In the proceedings, the Magistrate referred to a police report, which, however, did not show that a breach of the peace was imminent.

Held, that although this report might be taken to be incorporated by reference, yet that it was not sufficient to justify the order.

* Criminal Motion, No. 37 of 1881, against the order of Baboo Dwarka Nauth Roy, Deputy Magistrate of Pubna, dated the 20th January 1881.

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Per FIELD, J.—Unless the parties are able to show that there is such a dispute as is likely to induce a breach of the peace, the Magistrate should hold his hand and not proceed further. When the rights of the parties have been determined by a competent Court, the dispute is at an end, and it is the duty of the Magistracy to maintain the rights of the successful party, and the proper course for the Magistrate to pursue, if the defeated party does any act that may probably occasion a breach of the peace, is to take action under s. 491 of the Criminal Procedure Code, and require from such person security to keep the peace.

IN this case a rule had been obtained by one Gobind Chunder Moitra, calling upon one Abdool Sayad and others, to show cause why an order of the Deputy Magistrate of Pubna, made under s. 530 of the Criminal Procedure Code, declaring that Abdool Sayad and others were entitled to retain possession of certain lands until ousted by due course of law, and forbidding all disturbance of possession until such time, should not be set aside.

The facts of the case sufficiently appear from the judgment of PONTIFEX, J.

Mr. *H. Bell* and Baboo *Ishur Chunder Chuckerbutty* in support of the rule.

Mr. *Lee* and Baboo *Tarucknath Paulit* showed cause.

The following judgments were delivered :—

PONTIFEX, J.—I think this rule must be made absolute, and the order of the Deputy Magistrate must be set aside. In giving my reasons for this decision, it is necessary to advert shortly to some circumstances which preceded the order made by the Deputy Magistrate. The person moving for the rule is one Gobind Chunder Moitra, who alleges that, in March 1879, he purchased the property with respect to which the order which he seeks to set aside was made under s. 530 of the Code of Criminal Procedure, the date of such order being the 20th January 1881.

On the 20th March 1879, Gobind Chunder applied, under the Land Registration Act, to have the land registered in his name. The decision of the Deputy Collector, in which he found that Gobind Chunder had proved possession and

was entitled to registration, was not passed until the 24th December 1879.

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*Now it appears that, prior to this alleged purchase by Gobind Chunder Moitra, Abdool Sayad and Abdool Majid, who now oppose the rule, had obtained registration of the property in their names, under the Land Registration Act, on the 6th March 1879. It was therefore impossible for the Deputy Collector, on the 24th December 1879, to direct that the land should be registered in the name of Gobind Chunder Moitra. It was necessary that, for that purpose, his proceedings should go up to the Commissioner, who, if he confirmed the decision of the Deputy Collector, alone had the power to direct that the registration in the names of Abdool Sayad and Abdool Majid should be cancelled in order that registration might be effected in the name of Gobind Chunder Moitra. The proceedings accordingly went before the Commissioner, but it was not until the 29th September 1880 that he passed his final orders, and under those orders, in the month of October 1880, the registration in the names of Abdool Sayad and Abdool Majid was cancelled, and Gobind Chunder Moitra's name was finally registered. These registration-proceedings, therefore, occupied a period extending from the 18th March 1879 to October 1880. It must, however, have been manifest to Abdool Sayad and Abdool Majid, from the 24th December 1879, when the Deputy Collector decided in favor of Gobind Chunder's possession, that there was every probability that the result of the proceedings would be, that the property would be registered in the name of Gobind Chunder Moitra. As it seems to me, to evade these consequences, and while the reference was pending before the Commissioner in order that his ultimate orders might be obtained, recourse was had to proceedings under s. 530, which were commenced in July 1880.

In the registration-proceedings under the Land Registration Act, the Deputy Collector had decided the question in the presence of both parties. Each party had had an ample opportunity of adducing all the evidence that he thought necessary to prove his case. Each party did adduce evidence, and upon that evidence the Deputy Collector, acting under

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the Land Registration Act, finally decided that Gobind Chunder Moitra *had proved possession*, and that he was entitled to have his name registered. Now the criminal proceedings in July 1880 were started by certain ryots submitting a petition, of complaint, alleging that other of the ryots, at the instigation of Gobind Chunder Moitra, were going to do certain acts which would tend to a breach of the peace. Upon the receipt of that complaint, a police report was called for, and a report was accordingly made by the police. Their report is, that there were two persons who claimed to be landlords; that certain of the ryots took the part of one side, and others of the other side; and that, at a future time, when the crops came to be cut, it was probable that the ryots of one side might cut the crops which had been grown by the other side, and a breach of the peace might ensue; but the police recommended that it would be sufficient if the leading ryots on either side were bound over to keep the peace. Upon that report, the District Magistrate, who possibly had no notice of the registration-proceedings, held a proceeding under s. 530, and referred it to the Deputy Magistrate, who was the very same person who as Deputy Collector had decided the land-registration case in favor of Gobind Chunder Moitra, finding that he had proved that he was in possession of this property. The Deputy Magistrate took evidence with respect to the complaint under s. 530. There was nothing in the police report to implicate Gobind Chunder Moitra in any of the acts out of which it was suspected a breach of the peace might ensue. The police had only implicated the ryots. But notwithstanding, the Deputy Magistrate, in his office of Deputy Collector, had so recently, and after a full investigation, decided that possession was in Gobind Chunder Moitra, he considered that he might altogether disregard his prior proceedings as Deputy Collector, and proceed again under s. 530 to determine who was in actual possession of this land, being the very same question which he had already tried and decided.

Now, in my opinion the fact that these registration-proceedings were pending at the time that the application was made for interference under the Criminal Procedure Code, should

have made the Deputy Magistrate extremely careful not to make any order as to possession under s. 530, unless he was quite satisfied that a *bond fide* dispute existed, and that a breach of the peace was imminent.

The Meahs, knowing that the registration-proceedings could, under ordinary circumstances, only properly be set aside by a regular suit, thought they might avoid being obliged to resort to that remedy, if they could set the Criminal Court in motion under s. 530, and hence this alleged quarrel between the ryots and the application to the District Magistrate.

Unfortunately, the Deputy Magistrate, altogether disregarding the former order that he made after a full trial, has now entirely rendered nugatory his order of October 1880. In my opinion the Deputy Magistrate, knowing that the land-registration proceedings only awaited formal completion, ought not to have proceeded under s. 530 to deal with the question of possession—a question which he had himself so recently decided in the presence of both parties.

It would have been quite sufficient, if he thought a breach of the peace was imminent, to bind over the leading ryots on either side as recommended by the police. There was nothing to show from the police report that Gobind Chunder Moitra was implicated in the acts complained of, and it seems to me, in passing the order in respect of possession and in setting aside his own order, the Deputy Magistrate was acting improperly and unfairly to Gobind Chunder Moitra. It was never intended that the provisions of s. 530 should be used for the purpose of avoiding a decision so recently arrived at after a full trial.

The rule will be made absolute, and the order of the Deputy Magistrate set aside.

FIELD, J.—I also am of opinion that this rule must be made absolute, and the order of the Deputy Magistrate set aside. Under s. 530 of the Criminal Procedure Code, a Magistrate, in order to give himself jurisdiction, must first record a proceeding setting forth that he is satisfied that a dispute likely to induce a breach of the peace exists concern-

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ing land, &c., and this proceeding must state the grounds upon which he is so satisfied. It appears to me that, in the case before us, the proceeding recorded by the District Magistrate is defective in that it does not set forth in express language that he was satisfied that a dispute likely to create a breach of the peace existed in respect of the land in question between Gobind Chunder Moitra on the one side, and the Meahs on the other side; and that it is further defective in that it does not set forth the grounds upon which he was so satisfied that such dispute existed. The Magistrate's proceeding refers to a police report, which may perhaps be taken to be incorporated by reference. I think the proceeding itself ought to contain all the particulars essential to give the Magistrate jurisdiction, and that reference to any other document ought not to be necessary in order to the ascertainment of these essential particulars. But even if the police report be here taken to be part of the proceeding, the above defects are not removed, as this report shows merely that there was a dispute between two sets of ryots in the village, who had respectively taken the sides of Gobind Chunder Moitra and of the Meahs. Now the ryots are not parties to the present proceedings, the only parties being Gobind Chunder Moitra on the one side, and the Meahs on the other side; and it thus appears that the real "parties concerned in the dispute" were not the parties called upon to attend Court and state their claims to actual possession. There is another ground upon which it appears to me that the order of the Deputy Magistrate in this case should be set aside; and that is, because there was no such *dispute* as is contemplated by s. 530. When once a Magistrate has recorded the preliminary proceeding under the section, and has called upon the parties concerned in the dispute to appear before him, the express language of the section does not provide for any further inquiry into the fact of the existence of a dispute likely to induce a breach of the peace. When the parties appear before the Magistrate, the law expressly requires *only* that the fact of actual possession be inquired into. But it appears to me that the essence and basis of the jurisdiction, which a Magistrate can exercise under s. 530,

depends upon there being a dispute likely to create a breach of the peace; and that, when the parties appear before the Magistrate, if they are able to show, or if it otherwise appears to the Magistrate that there is no dispute, or no such dispute as is likely to induce a breach of the peace, the Magistrate should hold his hand and not proceed further.

I take it that the term "dispute" in s. 530 means a reasonable dispute, a *bonâ fide* dispute, a dispute between parties who have each some semblance of right or supposed right. It has been decided by this Court, in the case of *Rai Mohun Roy v. Wise* (1), that when a decree has been passed by a Civil Court regarding land in dispute, it is the duty of a Magistrate to maintain it; and he has no power again to institute proceedings regarding such land under this section of the Code of Criminal Procedure. The principle of this decision is this, that when the rights of parties have been determined by a competent Court, the dispute is at an end, and it is the duty of the Magistracy to maintain the rights of the successful party. In other words, the defeated party will not be allowed to go to the Criminal Court, and alleging the existence of a dispute, invoke the aid of the Magistrate and the police to neutralize the effect of the decree of a competent Civil Court. When the rights of the parties have been determined, there is no longer a "dispute" within the meaning of s. 530; and the proper course for a Magistrate to pursue, if the defeated party does any act that may probably occasion a breach of the peace, is to take action under s. 491 of the Code of Criminal Procedure and require from such person security to keep the peace.

In the case of *Rai Mohun Roy v. Wise* (1), the question of title had been definitively determined by the Civil Court; and no case has, so far as I am aware, as yet arisen in which the principle of that decision has been carried further, or extended to cases in which there has been merely a summary adjudication upon the question of possession. I think, however, that the proceedings under the Land Registration Act are proceedings to which the same principle should be extended.

(1) 16 W. R., Cr. Rul., 24.

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Under this Act a revenue officer is directed to hold an inquiry; that inquiry in this particular instance was held in the presence of both parties; and they had an opportunity of producing before the revenue officer evidence to show that they were in possession of the land. After making his inquiry, the revenue officer came to the conclusion that Gobind Chunder Moitra was in possession; his name was registered in the Collector's general register as that of the person in possession of the estate; and the result of this registration is, that the Meahs are not entitled to sue the tenants for rents; for to any such suit it is a sufficient defence that their names are not registered in the Collector's general register.

If, after these formal proceedings before the revenue authorities, it is competent to the Magistrate to take action under s. 530, an order made under this section may absolutely neutralize the effect of the registration proceedings (as has happened in this case), and great confusion and possible injustice may be done. Persons who have had experience in the mofussil are well aware why an order under s. 530 is so strenuously sought after in many cases. Such an order is important as regards the question of limitation. The person who is declared by the order of the Magistrate to be in possession under s. 530 can successfully set up such possession in answer to a plea of limitation.

The question of burden of proof, no unimportant question in many cases, depends materially upon whether a party occupies the position of a plaintiff or a defendant in a civil suit, and the person who succeeds in getting the Magistrate to declare him to be in possession, obtains no small vantage ground for subsequent litigation, *melior est conditio defendentis*.

Then whether a person who had a good title will be able to procure witnesses to give evidence in his favor, depends in no slight degree upon whether he is in possession or out of possession. • Regard being had to these considerations, I think that Magistrates should be most careful in applying the provisions of s. 530; that they should not proceed to act under this section unless they are satisfied that a dispute, a *bond fide* dispute, a reasonable dispute, a dispute in which

there is some semblance of right on either side, exists, and that such dispute is likely to induce a breach of the peace. I am satisfied that it was not the intention of the Legislature that the provisions of this section should be applied to any case in which a competent Court, whether in a regular suit or in that sort of proceeding which is in this country known as a summary proceeding, has decided that one person is entitled to, or is in possession of, land.

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I may refer to s. 535 of the Code of Criminal Procedure by way of further argument in support of this view. This section enacts, that "nothing in this chapter shall affect the powers of a Collector or a person exercising the power of a Collector or of a Revenue Court." The officer acting under the Land Registration Act is probably a Revenue Court; and if a Magistrate may, under s. 530 of the Code of Criminal Procedure, decide that a person is in possession, whom a revenue officer has under the provisions of the Land Registration Act held not to be in possession, the powers of such revenue officer or Court would be materially affected.

It therefore appears to me that the order of the Deputy Magistrate should be set aside, (1st) because the initiative proceeding of the District Magistrate was defective; (2nd) because the whole of the proceedings were without jurisdiction.

Rule absolute.

PRIVY COUNCIL.

KAMESWAR PERSHAD (PLAINTIFF) v. RUN BAHADUR SINGH
(DEFENDANT).

P. C.*
1880
Nov. 23.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Grounds supporting charge on the Inheritance by a Widow for her Debt.

In transactions such as the alienation by a widow of her estate of inheritance derived from her husband, any creditor, seeking to enforce a charge on such estate, is bound, at least, to show the nature of the transaction,

* *Present*:—SIR J. W. COLVILLE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR
R. P. COLLIER.

1880 and to show that, in advancing his money, he gave credit, on reasonable grounds, to an assertion that the money was wanted for one of the recognized necessities. The principle is, that the lender, although he is not bound to see to the application of the money, and does not lose his rights, if, upon *bonâ fide* inquiry, he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist, still is under an obligation to do certain things. These are to inquire into the necessity for the loan and to satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the borrower is acting in the particular instance for the benefit of the estate. This principle, laid down in *Hunooman Persaud Panday v. Mussamat Babootee Munraj Koonweree* (1), in regard to the manager for an infant, has been applied also to alienations by a widow of her estate of inheritance, and to transactions in which a father, in derogation of the rights of his son, under the Mitakshara law, has made an alienation of ancestral family estate.

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APPEAL from a decree of a Divisional Bench of the High Court, Bengal (2nd July 1878), varying the decree of the Subordinate Judge of the District of Gaya (6th December 1876).

The question in the suit giving rise to this appeal was whether the late Rani Asmedh Konwar (who was living when the suit was commenced), widow of the Raja of Tekari, in the Gaya District, had in her lifetime charged her widow's estate with a debt to the plaintiff of Rs. 72,612, rendering the estate, which she had obtained as widow of the Raja, liable to sale in satisfaction thereof.

The Rani had executed in 1872 a bond to the plaintiff for the above amount, and secured it by mortgage of her estate.

The Subordinate Judge found that the bond had been executed for legal necessities, and decreed that the amount should be realized by the sale of the mortgaged property.

The High Court was of opinion that the Rani's signature to the bond had been obtained without giving her the least intimation of the nature of the contents of the instrument, beyond that money was required, and that no legal necessity had been proved. It therefore held this appellant to be entitled only to a decree for the principal and interest of the debt, which was a personal one, for which the estate in the hands of the Raja's heir was not liable.

(1) 6 Moore's I. A., 393.

The facts are stated in their Lordships' judgment.

• Mr. *R. V. Doyne* and Mr. *C. W. Arathoon* appeared for the appellant.

The respondent did not appear.

The judgment of their Lordships was delivered by

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SIR J. W. COLVILLE.—The only material point to be decided upon this appeal arises in a somewhat peculiar manner. The suit was originally brought by the plaintiff, appellant, who is a mahajun carrying on business in the city of Benares, and also at Gaya, to enforce a bond and mortgage against the late Rani Asmedh Konwar, the instrument being dated the 1st of March 1872. It appearing, however, that the next reversionary heir was in possession of the property alleged to have been mortgaged under an *iknarnamah* executed by the Rani putting him in possession, apparently, of the whole of her husband's estate, he was joined as a party defendant in the suit; and it was prayed that a decree might be made for the amount sued for, with costs and interest, and that it might be awarded "by sale of the mortgaged and hypothecated properties, and in case the same do not cover the amount, by the sale of other properties, and from the person of the debtor." The suit, therefore, was framed for the purpose of obtaining, in case of need, an absolute decree for the sale of the property alleged to have been mortgaged, including the reversionary interest of the second defendant therein; and, accordingly, the second issue was settled so as to raise the question how far the reversionary estate was bound by the widow's disposition. It is in these words: "Whether or not was the amount claimed taken for a legal necessity; and whether or not is the amount of debt repayable by the property left by the husband of the widow Mussamut Asmedh Konwar, who contracted the debt."

The Subordinate Judge who tried the case in the first instance, found wholly in favour of the plaintiff, and gave a decree for the amount sued for; and a further direction that, in case it was not paid, the mortgaged properties should be sold out-and-out. The High Court, upon appeal, so far confirmed

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the decree of the Subordinate Judge that it left the widow bound to the extent of being a debtor on the bond for the amount stated on the face of the bond to be due, but determined that the deed had not been properly explained to her; that she did not understand, or was not properly informed, that it was a deed mortgaging the property; and, consequently, that all that could be given against her was a decree in the nature of an ordinary money-decree.

The appeal to their Lordships is against the decree of the High Court so far only as it was adverse to the plaintiff. After the decree was pronounced, and before the appeal was presented here, the widow died, and the second defendant, the only respondent upon the record, became the absolute owner of the property in question.

Their Lordships concur with the High Court in thinking that, upon the evidence, there was a total failure of proof as to the proper explanation of this deed to the lady. It is not necessary for them to say whether, that being so, they should have gone so far as to make the money-decree which was made against her. That is not the subject of appeal, and they must assume that so far the decree was properly made. Nor do they think it necessary to express any opinion, whether in point of fact the bond sued upon, upon the face of it, purports to pledge more than the widow's interest. They will assume that it was intended by those who prepared it, to be a pledge of the mouzas and property which she had inherited from her husband. The only question to be decided on this appeal is, whether the transaction created a charge on the inheritance; whether it made the property in question, when in the hands of the respondent, liable to satisfy the bond-debt for which a decree has been made against the widow.

In order to establish the affirmative of this proposition, it is necessary, in the first place, to show that the widow intended to do that which the law allows her to do in certain specified cases; viz., to make a pledge of her husband's estate. But if the High Court was right in supposing that the document was not properly explained to her, there is a failure of proof that she did really intend to do that. The question whether the pro-

perty was mortgaged at all depends upon the fact whether she intentionally executed a deed containing such a stipulation; and their Lordships have already intimated that, in their judgment, the High Court, dealing as it did with the evidence of Bishen Sahi and the other evidence in the cause, was right in coming to the conclusion that there was no such proper explanation of the bond as would bind her in respect of that stipulation.

Again, if this were otherwise, there would remain the question whether the plaintiff had satisfied the burden of proof which every plaintiff who seeks to charge the inheritance after the death of a widow, by virtue of a security executed by her, has to sustain. Their Lordships in no degree depart from the principles laid down in the case of *Hunooman Persaud Panday v. Mussamat Babootee Munraj Koonweree* (1), which has been so often cited. They have applied those principles in recent cases, not only to the case of a manager for an infant, which was the case there, but to transactions on all-fours with the present, namely, alienations by a widow, and to transactions in which a father, in derogation of the rights of his son under the Mitakshara law, has made an alienation of ancestral family estate. The principle broadly laid down is, that although the lender is not bound to see to the application of the money, and does not lose his rights if, upon a *bonâ fide* inquiry, he has been deceived as to the existence of the necessity which he had reasonable grounds for supposing to exist, he still is under an obligation to do certain things. The words of the judgment in that case are:—"Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate; but they think that if he does so inquire and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money." And the judgment ends thus:—"Their

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Lordships do not think that a *bond fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived."

It appears to their Lordships that, such being the law, any creditor who comes into Court to enforce a right similar to that which is claimed in the present suit is bound at least to show the nature of the transaction, and that in advancing his money he gave credit on reasonable grounds to an assertion that the money was wanted for one of the recognised necessities.

In this case there is hardly any evidence on the part of the plaintiff to show what negotiations took place with him, and what representations induced him to advance the money; still less is there any proof that, having those representations before him, he made the necessary and proper inquiries. The chief witness that has been called, Fakir Chand, says of himself, that, although he is a village wasil-baki-nuvis, and writes certain zemindari books, he has nothing to do with the books relating to the mahajani business. It is true that he speaks to having been present when persons purporting to come from the Rani asked for a loan of money for payment of Government revenue and the like; but one would expect in such a case as this that the gomashtha, who had the management of the books, and who was responsible for lending money from the kooti, would be the person to come forward and show upon the faith of what representations and after what inquiry he advanced the money. There is no evidence at all of that kind.

Then, again, the servants who are called from the defendant's establishment, give evidence which cuts both ways, because, although Dost Mahomed, calling himself one of the dewans of the Rani, professed to have gone to the plaintiff and to have taken money from him, he shows *prima facie* that there was no real necessity for the plaintiff to borrow money under the power which she could exercise only in the case of certain necessities. His evidence goes to show that the lady was in fact in very easy circumstances, and that she had a net revenue of about 1,30,000 rupees. He says:—"The amount of collections used to remain in the custody of the dewan. A certain amount, when required, used to be paid to the Rani. I cannot

say off-hand what amount of collection comes to my hands. The expenses of the Rani, whatever they may be, are restricted to charitable and pious purposes and distribution to people, &c. Besides this, she does not spend anything with a lavish hand." So again Mahadeo Lal, who was called on the part of the defendant, puts her income at even a larger amount, and says.—"The balance, exceeding a lac and thirty thousand, used to be a saving to the Rani as profit. This amount used to be lodged in the custody of the dewan. The necessary expenses used to be supplied to the Rani. The money would not be lodged in the cutcherry."

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The evidence of those two persons seems to their Lordships to be consistent with this state of things; that the Rani's servants, the dewans, chiefly managed her affairs: that if they had immediate occasion for a sum of money they may have gone to the plaintiff's kooti and got a temporary loan, but it fails to prove a necessity so serious as would justify a pledge of her husband's estate in excess of the ordinary powers of a Hindu widow, or reasonable grounds for the belief of such a necessity.

Then as to the latest transaction there is little or no evidence at all given by the plaintiff as to the settlement of the former accounts or the circumstances under which he advanced the small sum which made up the amount sued for upon the last bond. All that the witnesses state, is, that one Baboo Ram Coomar, who is said to be also a dewan of the Rani's, told the munshi to get this bond signed, some speaking to the making of the bond; but as to the part taken by the plaintiff in making the last bond, or as to any inquiries made on that occasion, there is no evidence whatever.

It appears to their Lordships that the High Court was right on both grounds in treating the transaction as not binding upon the estate; and they will, therefore, humbly advise Her Majesty to affirm the decree of that Court and to dismiss this appeal.

Appeal dismissed.

Solicitor for the appellant: Mr. T. L. Wilson.

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<p><i>A, B, and C, the joint owners of an estate, sued their tenant in the Munsif's Court for rent; the tenant defeated the suit by proving payment of the entire rent to B.</i></p> <p><i>A then brought a suit in the Small Cause Court against B for damages equal in amount to the one-third of rent due to him and the costs incurred by him and awarded against him in the rent-suit in the Munsif's Court. B pleaded that he had expended the share of rent due to A for the benefit of the joint estate, and that A had collected the rents of other mehals belonging to the joint estate, and had not accounted for such rents. Held, that the suit being one which involved questions of partnership account between the joint proprietors of an undivided estate, could not be entertained in a Court of Small Causes.</i></p>	
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<p>Article 86, sched. ii of Act XV of 1877, is intended to apply to cases where an account has been going on between two parties, and balances have been struck from time to time, showing the amount due from one of such parties to the other; and the suit to which that article is intended to apply is a suit brought by one of those parties against the other for the balance found to be due on that account.</p>	

- A creditor who does not openly assent to an amount acknowledged by his debtor to be due to him, is nevertheless entitled to take advantage of such acknowledgment so long as it remains uncontradicted and unexplained by his debtor.
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- XXXV OF 1858—*Application under—Interference of Court—Illtreatment of Lunatic—Accounts of Joint Property—Mitakshara.*] The husband of a lunatic's daughter applied to the Court to declare his father-in-law, who was a member of a joint Mitakshara family, to be a lunatic, and appoint a manager of his property and guardian of his person under Act XXXV of 1858. The lunatic had an interest both in joint ancestral property and in property inherited collaterally, which might, but was not shown to, belong to him separately. The lower Court found that the application was made with a view to taking consequent proceedings for partition.
- Held* that, it appearing that he had remained for sixteen years in the same house under the same guardians, and there being no allegation of illtreatment, no sufficient grounds were shown for the Court's interference, or the appointment of another guardian of his person. Before any action can be taken under the Act in this respect, there ought to be a strong case made out that the change of custody would be for the lunatic's benefit. *Held* also, that as his daughter could not inherit his ancestral property, and as it was doubtful if the collaterally inherited property was the separate property of the lunatic, the Court would not, under such circumstances, appoint a manager of the property: but that the guardians of the lunatic, who were managers of the joint family, should, on her request, furnish accounts to the daughter, of the management of the collaterally inherited property.
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Held also, that the mortgage decree declaring the lien over all the mortgaged properties covered the surplus sale-proceeds then in the hands of the Collector, because these moneys must, as between the mortgagee and attaching creditors of the mortgagor, be taken to represent the mortgaged properties.

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AMENDMENT OF RECORD ON APPEAL.] A second plaintiff was added in the Court below, but no amendment was made in the record, and the suit was dismissed with costs. An appeal being brought, the original plaintiff failed to pay the costs, was made insolvent, and the Official Assignee declined to proceed with the appeal. It was objected that the appeal ought to be dismissed, there being no appellant on the record; but the Court allowed the appeal to proceed, and the amendment ordered by the Court below to be effected.	
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APPEAL—Insolvency—Refusal to grant Application to be declared Insolvent—Code of Civil Procedure (Act X of 1877), ss. 351, 588, cl. 17.] An order refusing to grant an application to be made an insolvent, is appealable under cl. 17, s. 588 of the Code of Civil Procedure.	
Such an order must be considered to be one made under s. 351.	
NUBBI BUKSH v. CHASNI	168
Jurisdiction—Time from which an Order of Appointment dates.] An Assistant Magistrate convicted an accused on the 12th August, and by an order of even date, such Magistrate was invested with power to act as a Magistrate of the 1st class, although the fact, that he had been so invested with full powers, was not communicated to him until the 23rd idem. The accused appealed to the District Magistrate, and was acquitted. On motion made to the High Court to set aside the acquittal, on the ground that,	

after the date of the order of the Lieutenant-Governor investing the Assistant Magistrate with further powers, no appeal lay to the District Magistrate,—*held*, that even supposing the Lieutenant-Governor's order conferred first class powers upon the Assistant Magistrate from the moment it was made, it must be shown before the District Magistrate's decision could be set aside, that the order of the Lieutenant-Governor was signed before the conviction.

Quære.—Whether an order investing a Magistrate with 1st class powers is of any force, or amounts to an authority to exercise such powers, until the order has been officially communicated to the Magistrate?

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APPEAL—*Order by Judge of the High Court presiding over the Privy Council Department—Letters Patent, s. 15—Judgment—Certified Copy of Order of the Privy Council—Civil Procedure Code (Act X of 1877), s. 610.*] A decree obtained on appeal by certain defendants in the High Court, was appealed to the Privy Council by one only of the two plaintiffs to the suit, and the decision of the High Court was reversed; the plaintiff who had appealed assigned her share in the order of the Privy Council to one of the defendants, and delivered him the certified copy of the decree made in the Privy Council. The plaintiff who had not appealed to the Privy Council applied to the High Court for leave to transmit the order to the Court of first instance for execution of the share decreed to him, but on account of the assignment above-mentioned, was unable to produce the certified copy of the decree of the Privy Council. The Judge presiding over the Privy Council Department in the High Court held, that the production of a certified copy of the order of the Privy Council was excusable under the circumstances, but refused the application, on the ground that the decree of the Court of first instance, which was affirmed by the Privy Council, could only be executed as a whole and not partly by one of the plaintiffs.

Held on appeal *per* GARTH, C. J.—That the duties of a Judge in dealing with the meaning of decrees of the Privy Council are purely ministerial, and that any order made in such ministerial capacity could not be considered a judgment, and could not, therefore, be made the subject of an appeal to a Bench of the High Court under s. 15 of the Charter.

Per WHITE and MITTER, JJ.—An order of a Judge presiding over the Privy Council Department in the High Court, rejecting an application for execution, is a final order, and is a judgment within the meaning of s. 15 of the Charter, and is therefore appealable.

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-- *Refusal of District Judge to recall a Certificate under Act XXVII of 1860.*] No appeal lies from an order of a District Judge, refusing an application to recall a certificate granted by him under Act XXVII of 1860.

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-- **AGAINST ORDER REJECTING PLAINT**—*Plaint insufficiently Stamped—Court Fees Act (VII of 1870), s. 12, para. 1, sched. ii, dio. ii, art. 17, part iii—Civil Procedure Code (Act X of 1877), s. 1, tit. "Decree."*] An appeal lies against an order rejecting a plaint on the ground of its being insufficiently stamped.

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An appellant, who has obtained a decree setting aside the decision of the Court of first instance, is not entitled to a further appeal to the High Court, on the ground that he is dissatisfied with some of the findings recorded in the judgment of the lower Appellate Court, an appeal from an appellate decree under s. 584 being strictly restricted to matters contained in the decree alone.	
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An order refusing an application to execute a decree is not an adjudication within the rule of <i>res judicata</i> .	
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The Limitation Act is not applicable to an application for probate; such an application, therefore, is not barred by art. 178 of sched. ii of that Act.	
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An applicant, presenting a petition for the rehearing of an appeal decided <i>ex parte</i> , must, at the time of making such application, be prepared to satisfy the Court; that the notice of appeal was not duly served upon him, or that he was prevented by sufficient cause from attending when the appeal was called on for hearing.	
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ARBITRATION— <i>Civil Procedure Code (Act X of 1877), chap. xxxvii—Kabuliat, Suit for—Suit under Act X of 1849.</i>] Notwithstanding that chap. xxxvii of Act X of 1877 (in reference to arbitration) does not refer specially to suits brought under Act X of 1859, yet if both parties to a suit for a kabuliat brought under the latter Act agree to refer the matters in dispute between them to certain arbitrators named by them, and file a joint petition in the Court of the Deputy Collector, stating that they had so agreed, and praying that the case may be referred to such arbitrators, neither of them will be afterwards at liberty to object to a decree made, embodying the award of the arbitrators, on the ground that the reference to arbitration was irregular, and not warranted by any of the provisions of Act X of 1877.	
When a case has been so referred, the arbitrators are at liberty to determine what appears to them to be a fair and equitable rate of rent, and notwithstanding the amount so found is less than that demanded by the plaintiff in his plaint, the Court out of which the reference issued is not at liberty on that ground to dismiss the suit, but is bound to order the defendant (with the alternative of eviction) to execute a kabuliat in favour of the plaintiff, engaging himself to pay rent to the plaintiff at the rate determined by the arbitrators to be fair and equitable.	
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ATTACHING-CREDITOR — <i>Right to Redeem Mortgage — Civil Procedure Code (Act X of 1877), ss. 276, 282, 295.</i>] An attaching creditor has not, as such, any right to redeem a mortgage subsisting prior to his attachment.	
SOORHUL CHUNDER PAUL <i>v.</i> NITYE CHURN BYSACK	664
ATTACHMENT BEFORE JUDGMENT — <i>Civil Procedure Code (Act VII of 1859), s. 240—Objection as to non-compliance with requirements of s. 239—Burden of Proof—Civil Procedure Code (Act X of 1877), ss. 274, 276.</i>] A suit on a mortgage foreclosed under Reg. XVII of 1806, s. 8, comprising property attached before the date of the mortgage under s. 81 and the following sections of Act VIII of 1859, was brought against the purchaser of the attached property, which had been sold under the decree obtained by the attaching creditor. The defence was, that the	

mortgage falling within the provisions of s. 240 of the Act was void as against the attaching creditor and those claiming under him. For the mortgagee it was contended, that the attachment could not prevail, it not having been proved affirmatively that the requirements of s. 239 relating to the intimation of the attachment had been complied with.

Held, that this objection to the validity of the attachment could not be raised for the first time on this appeal, even if it was not rather for the mortgagee, seeking to deprive the attaching creditor of his possession, to prove the non-observance of the formalities in question.

Semble.—A re-attachment of property after decree does not imply an abandonment of an attachment obtained before decree.

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ATTESTATION OF WILL—*Succession Act (X of 1865), s. 50—Hindu Wills Act (XXI of 1870), s. 2.* Section 50 of the Succession Act (X of 1865) clearly intends that the two attesting witnesses to a will shall sign their names *after* the testator or testatrix shall have executed the will.

If a testatrix admits a signature on a will to be hers before a Registrar of Assurances, and is identified before him by one of the witnesses to the signature, and both the Registrar and the identifier sign their names as witnesses to the admission made,—

Held, that such an attestation would be sufficient to satisfy s. 50 of Act X of 1865.

IN THE MATTER OF THE PETITION OF HURRO SUNDARI DABIA.

HURRO SUNDARI DABIA v. CHUNDER KANT BHUTTACHARJEE 17

ATTORNEY AND CLIENT—*Attorney's Lien—Discharge by Dissolution of Partnership—Contract Act (IX of 1872), ss. 1, 171.*

Where a firm of attorneys dissolved partnership after the death of a client, there being at that time papers and documents belonging to the client in their hands, and a debt due in respect of costs from the client to them,—

Held, that the dissolution of partnership operated as a discharge by the firm, and that the attorneys were not entitled to retain the papers and documents until their costs were paid, but were bound to hand them over to the administrator of the client.

Section 171 of the Contract Act does not give an attorney an absolute lien. Section 1 provides that nothing in the Act contained shall affect any usage or custom of trade, and, as no part of the English law is inconsistent with s. 171, cases arising in this country must be governed by the English authorities. According to those authorities, while the relation of attorney and client exists, the client may either continue to employ the attorney or change him. When he claims to do the latter, the attorney being willing to act, he cannot ask the attorney to give up papers in his possession without first satisfying the lien. The attorney has his option,—he may, if he chooses, either go on acting for his client, or cease to act; if he adopt the latter course he must give up the papers. On the death of the client his representative stands in exactly the same position with respect to the attorney as the client did.

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BAILMENT — Passenger's Luggage—Ticket—Conditions endorsed— Negligence—Registration of Luggage—Common Carriers—Foreign Steam Ship Company—Contract Act (IX of 1872), s. 151.] In a suit for damages for loss of passenger's luggage by the wreck of a ship belonging to a foreign company, it appeared that the plaintiff had received a ticket in the French language, which on its face stated that it ought to be signed by the passenger, and that it was issued subject to certain conditions on the back. These conditions, among other things, stated that the company would not be respon- sible for loss or damage arising from accidents or risks of the sea; that the ticket was delivered subject to the conditions that certain articles of a specified nature should be made the subject of a special declaration, in default of which the company would not be liable; that the company would not be answerable for unregistered luggage; and that luggage might be insured at any of the com- pany's offices. It was not stated where registration of luggage might be effected. The ticket was not signed by the plaintiff. The plaintiff alleged that he did not understand the French language, and that the conditions had not been explained to him by any person.	
<i>Held</i> , that the company being a foreign company were not com- mon carriers;	
that the plaintiff was bound by the clauses and conditions on the back of the passage-ticket;	
that none of the conditions had the effect of relieving the com- pany from the consequences of their own negligence;	
that, in order to establish a defence upon the ground that the plaintiff's luggage was not registered, it was necessary for the defendants to prove, not only that the plaintiff was bound by the conditions, but also that they were ready and willing to register the plaintiff's luggage, and that the plaintiff did not in fact register it;	
that as the contract was made in Calcutta, the defendants were bound by the provisions of s. 151 of the Indian Contract Act.	
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for measurement of lands under s. 38 of Beng. Act VIII of 1869, cannot be said to have made a "due enquiry," and therefore should not make an order under that section that the tenures have lapsed, until he has made use of all the powers given him by s. 40 in order to procure the attendance of witnesses.

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BENG. ACT VIII OF 1869, s. 58—*Limitation—Execution of Decree—Delay and Laches—Costs.*] In a suit for arrears of rent under Beng. Act VIII of 1869, a decree was obtained, on the 30th June 1876, for a sum which with costs amounted to less than Rs. 500. Application for execution was made, in December 1877, against property other than that for which the rent was due; but was, in the first Court, opposed successfully by the judgment-debtor, on the ground that the undertenure should first be proceeded against, though such undertenure had already been sold away in execution of another decree, and the execution-proceeding was struck off on the 15th March 1878, and the property released from attachment. The judgment-creditor appealed, and was successful both in the lower Appellate Court and the High Court, the latter decision being dated 26th February 1879. The costs awarded him in these proceedings, if added to the amount of the decree, would amount to a sum of more than Rs. 500. The next application for execution was made on 19th August 1879.

Held, that the costs of the appeals in the execution-proceedings should not be added to the decree; and, therefore, the decree being for less than Rs. 500, the provisions of s. 58, Beng. Act VIII of 1869, applied to it.

Held also, that the attachment having been removed in March 1878, the execution of the decree was barred under that section.

The question of due diligence on the part of a judgment-creditor can be gone into on a second appeal.

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See BENG. EXCISE ACT, ss. 9, 58, 74. EXCISE 575, 621, 832

EXCISE ACT (Beng. Act VII of 1878), ss. 9, 58, 74—*Introduction into Calcutta of Spirituous Liquor manufactured elsewhere—Limits fixed by Collector—Additional Punishment—Alternative Sentence of Imprisonment.*] The provisions of s. 74 of the Beng. Excise Act as to additional punishment, where there has been a "previous conviction for a like offence," contemplate merely the case of the offender having been already convicted of an offence punishable with a fine of Rs. 200 or upwards, and being again convicted of another offence punishable with the same punishment; it is not necessary that he should have been previously convicted of the same offence.

The accused were sentenced by the Presidency Magistrate, under ss. 58 and 74 of the Beng. Excise Act, to a fine of Rs. 200 each, in default to three months' imprisonment, and in addition to six months' imprisonment, which was the maximum term that could be awarded under s. 74. *Held*, that the sentence of imprisonment was not in excess of the powers given to the Magistrate by s. 12 of the Presidency Magistrates' Act, the imposition of the additional sentence of imprisonment not affecting the Magistrate's powers as regarded the original sentence under s. 58.

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No limits with regard to any distilleries in Calcutta having been fixed under s. 9 of the Act within which spirituous liquor manufactured otherwise than in that particular distillery, shall be introduced or sold without a special pass, and the fixing of such limits being necessary to a conviction of an offence under s. 58, the convictions in this case were set aside.	
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BENG. EXCISE ACT (<i>Beng. Act VII of 1878</i>), ss. 15, 59, 60.	
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<i>s. 53—Sale by Licensed Vendor contrary to Terms of his License.</i>] Section 53 of the Beng. Excise Act does not apply, to sales by a licensed vendor contrary to the terms of his license. That section provides for a breach of the condition of a license not covered by the second clause of s. 59 of the Act.	
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BOND— <i>Limitation Act (XV of 1877), s. 25, sched. ii, art. 66.</i>] Where a bond, by its terms, stated that money advanced should be repaid on the 30th Pous 1283 B. S., and it so happened that, in the year 1283, the month of Pous consisted only of twenty-nine days (the 29th Pous, answering to the 12th January 1877), <i>held</i> , that a suit brought on the 13th January 1880 was in time.	
ALMAS BANEE v. MAHOMED RUJA	239
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— TRUST— <i>Mixing Trust Funds with Money of Trustees—Commission on Trust Moneys.</i>] It is a grave breach of duty in trustees, or administrators taking out letters of administration, to estates in this country under powers-of-attorney from executors or next-of-kin abroad, to mix the incomes raised by them from trust-properties, or the funds of the estate, in one common fund with their own moneys, and such a course of dealing may expose the trustees or administrators to criminal as well as civil liabilities.	
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REGISTRAR— <i>Registration Act (VIII of 1871), ss. 49, 60.</i> Where a Registrar of Assurances has intentionally and deliberately issued a certificate of due registration of a document, with knowledge of certain facts relied on as affecting his power to grant the certificate, the Courts are bound to accept such certificate as due proof of registration, and cannot go behind it for the purpose of satisfying themselves that the Registering Officer has strictly conformed with all the provisions of the Act.	
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TO COLLECT DEBTS, RIGHT TO— <i>Act XXVII of 1860—Question of Validity of alleged Adoption—Title.</i> A, alleging himself to be an adopted son, opposed the application for the grant of a certificate under Act XXVII of 1860 to B, who, irrespective of the alleged adoption, would be the legal lineal heir of the deceased. The Court before whom the application was made refused the grant of the certificate, on the ground that sufficient <i>prima facie</i> evidence existed establishing the validity of the adoption. On appeal held, that the Appellate Court, concurring with the opinion expressed by the Court of first instance in respect of the factum of the adoption, would not be justified in setting aside the decision, on the ground that such Court was wrong in entering into and deciding the question as to the validity of the adoption. On an application for the grant of a certificate under Act XXVII of 1860, which is opposed by a party, who alleges he has a preferable title to it, the Court should adjudicate the question of title, with a view to determine which party has the preferential right to the certificate.	
IN THE MATTER OF THE PETITION OF SHEETANATH MOOKERJEE v. PROMOTHONATH MOOKERJEE	303
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-----, s. 32— <i>Adding Parties as Plaintiffs—Act XXVII of 1860, s. 2—Holder of Certificate of Administration.</i> <i>A</i> sued as only son and heir of his father <i>B</i> . <i>C</i> , the widow of <i>B</i> , having, with the concurrence of <i>A</i> , taken out letters of administration to <i>B</i> 's estate, was, on the application of <i>A</i> at the hearing of the suit, made a co-plaintiff under s. 32 of the Civil Procedure Code.	
<i>Held</i> , that <i>C</i> ought not to have been joined as a plaintiff in the suit, inasmuch as <i>A</i> had no right at all to sue.	
Section 32, as far as the addition of plaintiffs is concerned, only applies to those cases in which the original party who brought the suit had some title to sue.	
<i>Per</i> PONTIFEX, J.—The power given by s. 27 of the Code ought to be exercised before the first hearing of the case.	
<i>Held</i> also, that s. 2 of Act XXVII of 1860 prohibited <i>A</i> from suing alone, for although he was, no doubt, beneficially entitled to recover it, yet there was no vexatious or fraudulent withholding of the debt within the meaning of that section.	
<i>Per</i> GARTH, C. J.—A debt cannot be said to be "vexatiously withheld" within the meaning of that section, simply because the debtor omits to pay it.	
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-----, s. 560.	
<i>See</i> APPLICATION FOR REHEARING ...	548
-----, s. 586 — <i>Appeal in cases cognizable by a Small Cause Court.</i>] <i>A</i> was the proprietor of nine annas of a mouza, <i>B</i> and his family of one anna, and <i>C</i> and others of the remaining six annas. <i>B</i> and his family having occupied and enjoyed, to the exclusion of their co-shareholders, fifty-four bighas of the mouza, failed to pay any rent in respect of such occupation. <i>A</i> instituted a suit against them (making <i>C</i> and the other holders of the six annas share defendants to the suit) to recover the sum of Rs. 412-8 as the sum justly due to him after making all proper deductions, including as well the share of the rent of the fifty-four bighas to which the six annas shareholders were entitled, as also the share which <i>B</i> and his family were entitled to retain as proprietors of a one-anna share. <i>Held</i> , that the facts showed an implied contract on the part of <i>B</i> and his family to pay to their co-shareholders whatever, upon taking an account, should appear to be due to them; and that, inasmuch as the total amount sought to be recovered in the suit by <i>A</i> did not exceed 500 rupees, the suit was one which might have been brought in a Small Cause Court, and therefore the plaintiff had no right of second appeal to the High Court under s. 586 of the Code of Civil Procedure.	
<i>ASMAN SINGH v. DOORGA ROY</i> ...	
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Where the plaintiff claimed as paternal uncle's grandson and only heir of <i>N</i> , and the evidence showed that <i>N</i> 's father was one of three brothers, but it was not stated in the plaint, nor shown by the evidence, who was the father of the three brothers,— <i>held</i> , that the suit ought to be dismissed, it being incumbent on the plaintiff, claiming as a collateral heir, to show who the common ancestor was from whom he derived title.	
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The plaintiff, a minor, was, as daughter and one of the heirs of <i>A</i> , entitled to 7-24ths of his estate. The value of <i>A</i> 's estate was uncertain, and depended on whether or not <i>A</i> had been a partner in business with <i>M</i> , and whether or not a sum of Rs. 30,000 had been paid by <i>M</i> to <i>A</i> in satisfaction of all claims which <i>A</i> had against <i>M</i> in respect of the estate of <i>K</i> , a deceased brother of <i>A</i> and former partner in the same business. <i>M</i> having, on <i>A</i> 's death, possessed himself of all the estate of <i>A</i> , the plaintiff brought a suit against <i>M</i> , in which a decree was made ordering an account to be taken of the estate of <i>A</i> which had come into the hands of <i>M</i> . Pending such account, <i>M</i> died, leaving a will, by which he appointed the son of <i>A</i> and another his executors, and the suit was revived against them. In their application for probate they stated that the value of <i>M</i> 's estate, so far as they had been able to ascertain and were aware, was Rs. 4,41,000. Shortly after probate was granted, negotiations were entered into between the executors and the advisers of the plaintiff for a compromise, and a petition was, with the concurrence of the executors, presented by the plaintiff to the Court, asking for its sanction to the terms agreed upon by the parties, which were, that the plaintiff should receive Rs. 20,000 in full of all demands, and Rs. 5,000 for her costs of suit. This petition took, as the value of <i>M</i> 's estate, the amount stated by the executors in their application for probate, and stated that the value of <i>A</i> 's estate, in case the abovementioned payment by <i>M</i> was proved, would be Rs. 30,000, and in case it was not proved, then a moiety of the estate of <i>M</i> ; and that, considering the difficulties the plaintiff had to meet in proving her case, and with a view to put an end to further trouble, litigation, and	

expense, the above terms had been agreed to on her behalf. These terms of compromise were sanctioned by the Court on the 11th September 1876. Shortly afterwards, further property was discovered belonging to the estate of *M.* The plaintiff brought a suit against the executors to set aside the compromise, alleging that the terms had been accepted by her on the faith of the representation made by the executors in their application for probate, and charging them with wilful and fraudulent concealment. There was evidence to show that some of the property subsequently discovered was such that the defendants as executors ought to have known, even if they did not of its existence at the time of the compromise. *Held*, that even though the executors had no such knowledge, and there was no actual fraud, yet there was such culpable ignorance and neglect of duty on their part as to amount to fraud, and carry with it the consequences of knowledge, and as the compromise had in consequence been entered into by the parties and sanctioned by the Court under a misapprehension of material fact, the plaintiff was entitled to have the compromise set aside, and the parties restored to their rights in the former suit at the time it was effected.

Per PONTIFEX, J.—In cases where the sanction of the Court is required, as where there is an infant concerned, each party is bound to see that the materials on which the sanction of the Court is asked for are unimpeachable.

Per PONTIFEX, J.—*Quære*.—Whether in this suit, if the questions were found to arise, it would be necessary for the Court to consider whether it would be for the benefit of the minor that the compromise should be set aside?

Per GARTH, C.J.—*Semle*.—Even if it only appeared that the compromise had been entered into and sanctioned under an entire mistake of the parties and of the Court with regard to the subject-matter of the agreement, it ought to be set aside under s. 20 of the Contract Act.

Per GARTH, C.J.—In a substantive suit by a minor to set aside a compromise made with the sanction of the Court obtained by fraud or mistake, it is not the province of the Court to inquire whether it would or would not be for the benefit of the minor that the compromise should be set aside; though it might be otherwise on an application for review to the Court which granted the sanction.

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See BAILMENT 227

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OF PROSECUTION BY ADVOCATE OR ATTORNEY—*Permission by Magistrate—Presidency Magistrates' Act (IV of 1877), s. 129.* With the exception of the Advocate-General, Standing Counsel, Government Solicitor, or other officer generally or specially empowered by the Local Government in that behalf, no person, whether counsel or attorney, can claim the right to conduct the prosecution of any criminal case without the permission of the Presidency Magistrate.

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CONTAGIOUS DISEASES ACT (XIV of 1866), ss. 11, 21— <i>Rules 13 and 27 passed under the Act—Magistrate, Competency of—Jurisdiction.</i> Any woman desirous of ceasing to carry on the business of a common prostitute is, under the provisions of the Indian Contagious Diseases Act, 1868, absolutely entitled to have her name removed from the register; and any rule, or portion of a rule, purporting to have been framed under the provisions of that Act which places any obstacle on the way of her doing so, is <i>ultra vires</i> , and therefore void.	
Where a woman is prosecuted before a Magistrate under s. 11 of Act XIV of 1868, she is not precluded from pleading that she has ceased to be a common prostitute, and that she has taken steps, under s. 21 and the rules framed thereunder, for the removal of her name from the register; and the Magistrate is competent to entertain such a defence.	
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CONTRACT— <i>Breach of Contract—Time for Performance.</i> A contract for the sale of seed contained the following provision:—“Refraction guaranteed at four per cent., with usual allowance up to six per cent., exceeding which the seller is to reclean the seed at his expense within a week; failing which buyers to have the option of cancelling that portion of the contract tendered, or of buying against the seller, or of taking the parcel as it stands, with usual allowance for excess refraction. Delivery from seller's godown in pile up to the 15th of July next.” On the 10th July, the vendor tendered the seed. On examination the refraction was found to be above the contract rate. It was agreed that the vendor should reclean the seed; and on the 15th July, the purchasers went to take delivery of the seed, which was found still to be not sufficiently cleaned. On the 15th July, the vendor said that he should require a week longer for that purpose. The purchasers then cancelled the contract. In a suit by the vendor for damages for breach of contract,—	
<i>Held</i> —(1), that the breach of the contract was with the plaintiff; (2), that the week allowed for recleaning commenced from the 10th July; and that as the plaintiff had not succeeded in reducing the rate of refraction to the contract rate, the defendants had a right to reject the seed; and that the plaintiff was not entitled to further time to reclean it again.	
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See LIMITATION ACT, XV OF 1877, SCHED. II, ARTS. 66, 116 94

_____, CONSTRUCTION OF—"Delivery in whole of November on seven days' notice from Buyer"—Breach of Contract.] A contract for delivery by the defendants to the plaintiff of 1,000 bags of ginger stated, that "delivery was to be taken and given in the whole of November on seven days' notice from the buyer." On the 5th November, the plaintiff gave notice to the defendants requiring delivery to be given "within seven days;" and again on the 11th, that he was prepared to take delivery on the following day. On the 12th, the defendants wrote to the plaintiff, stating that they would give delivery on the 28th, 29th, and 30th November. On the 15th, the plaintiff gave notice that he considered the contract at an end. In a suit for damages for non-delivery,—*held* (affirming the decision of the Court below), that the words "on seven days' notice from the buyer" were intended to give the buyer the right of fixing the particular time in November at which the delivery was to commence, and that the defendants were, therefore, bound to commence delivery on the expiration of the seven days' notice.

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See PRINCIPAL AND SURETY ... 2

_____, s. 151.

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_____, s. 265—*Suit for Adjustment of Accounts of a Partnership—Jurisdiction.*] Section 265 of the Contract Act, while it enables a partner, after the termination of a partnership, to apply to the District Court to wind up the business, does not take away the ordinary right of suit in any Civil Court having jurisdiction to have the accounts of the partnership taken.

LUCHMAN LALL v. RAM LALL ... 521

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See CRIMINAL PROCEDURE CODE, s. 227, CL. (h) ... 579

COPYRIGHT ACT (XX of 1847), s. 7—*Small Cause Court Acts (IX of 1850 and XI of 1865)—Zilla Court—Act XII of 1876.*] As the class of cases provided for by s. 7 of the Copyright Act (XX of 1847) was transferred to the jurisdiction of the Calcutta Court of Small Causes by Act IX of 1850, notwithstanding the express language used in s. 7 of the Copyright Act, so by analogy the jurisdiction in the same class of cases arising in the Mofussil was transferred to the jurisdiction of the Mofussil Courts of Small Causes by Act XLII of 1860 and Act XI of 1865.

But sched. i of Act XII of 1876, amending Act XX of 1847, has now re-transferred the jurisdiction in such suits to the District Courts.

IN THE MATTER OF THE PETITION OF HAMEEDOOLLAH. HAMEEDOOLLAH v. MAHOMED ASGHUR HOSSEIN ...	499
CO-SHARERS— <i>Enhancement—Notice of Enhancement.</i>] <i>Held</i> , in a suit for enhancement by one co-sharer, to which the other co-sharer was made a party, that one co-sharer is not competent to issue a proper notice of enhancement without the consent of the other co-sharers previously obtained, though the rent has been paid to each co-sharer separately. Under the ruling of the Full Bench, in the case of <i>Guni Mahomed v. Moran</i> , he must first establish his right to a separate contract to recover his rent separately on his individual share.	
KASHEEKISHORE ROY CHOWDERY v. ALIP MUNDOL ...	149
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— Abatement or Dismissal of Suit for want of Jurisdiction— <i>Presidency Small Cause Courts Act (IX of 1850), ss. 42, 52.</i>] Where a plea to the jurisdiction of the Small Cause Courts established under Act IX of 1850 is successful, the judgment ought to be one dismissing the suit. But whatever the form, it should be stated that the suit abates or is dismissed "for want of jurisdiction." In such a case the Court has power to award costs to the defendant.	
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— Application on behalf of Arbitrators— <i>Reference.</i>] There is nothing in the Civil Procedure Code which authorizes arbitrators to apply to the Court for confirmation of an order passed by them, making payment of their fees a condition precedent to the hearing of a reference.	
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s. 66 — <i>Dishonestly retaining in British Territory Property stolen beyond British Territory.</i>] A Nepalese subject, having stolen cattle in Nepal, brought them into British territory, where he was arrested and sentenced to one year's rigorous imprisonment. <i>Held</i> , that he could not be tried for the theft itself, but that he might be convicted of dishonestly retaining the stolen property.	
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s. 227, cl. (h)— <i>Recording Reasons for Conviction—Practice of High Court on Revision.</i>] Under cl. (h) of s. 227 of the Criminal Procedure Code, although a Magistrate is not required to record any evidence, he should, in recording his reasons for the conviction, state them so, that the High Court, on revision, may judge whether there were sufficient materials before him to support the conviction.	
Where they were not so stated, the High Court, on motion, set the conviction aside.	
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ss. 471, 467— <i>Institution of Criminal Prosecution pending Appeal in Civil Court.</i>] If, in the course of a proceeding, either civil or criminal, a Judge or Magistrate finds clear ground for believing that either the parties to the proceeding or their witnesses have committed perjury or any other offence against public justice, he is justified in directing	

criminal proceedings against such person under s. 471 of the Criminal Procedure Code without any further enquiry than that which he has already held in his own Court.

As a matter of discretion and propriety, it is right for a Court, before committing a person on a charge of perjury upon his own uncontradicted statement, to await the hearing of the appeal, where an appeal is pending, in the case in which he is charged with such perjury.

IN THE MATTER OF MUTTY LALL GHOSE ... 308

CRIMINAL PROCEDURE CODE (Act X of 1872), ss. 491, 530—
Dispute likely to cause Breach of the Peace—Decision on Title by Civil Court—Police Report—Incorporation of, by Reference.] On the 20th of March 1879, A applied to have certain lands, which he had lately purchased, registered in his name. The order of the Deputy Collector, declaring that A had proved possession, and was entitled to registration, was not passed until the 24th December 1879. Prior to A's purchase, B and C had, on the 6th March 1879, obtained registration of the same property. The proceedings were sent to the Commissioner, who, on the 29th September 1880, declared A to be entitled to the land; and in October the registration in the names of B and C was cancelled, and A's name was finally registered. In July 1880, proceedings under s. 530 of the Criminal Procedure Code were commenced upon the petition of certain ryots, who alleged that other ryots, at the instigation of A, were going to do acts which would lead to a breach of the peace. The Deputy Magistrate, the same person who as Deputy Collector had decided the land-registration case in favor of A, proceeded under s. 530 to consider the question as to who was in possession, and found that B and C were in possession.

Held, that the Deputy Magistrate could not, in these proceedings, set aside the order which he had made in the registration-case, as that order could only be set aside in a regular suit.

The proceedings recorded by the Deputy Magistrate did not set forth in express language that he was satisfied that a dispute likely to create a breach of the peace existed in respect of the land in question, between A on the one side, and B and C on the other; nor did it set forth the grounds upon which he was so satisfied that such dispute existed.

Held, that the proceeding was therefore defective.

In the proceedings the Magistrate referred to a police report, which, however, did not show that a breach of the peace was imminent.

Held, that although this report might be taken to be incorporated by reference, yet that it was not sufficient to justify the order.

Per FIELD, J.—Unless the parties are able to show that there is such a dispute as is likely to induce a breach of the peace, the Magistrate should hold his hand and not proceed further. When the rights of the parties have been determined by a competent Court, the dispute is at an end, and it is the duty of the Magistracy to maintain the rights of the successful party, and the proper course for the Magistrate to pursue, if the defeated party does any act that may probably occasion a breach of the peace, is to take action under s. 491 of the Criminal Procedure Code, and require from such person security to keep the peace.

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... ss. 505, 506—
Deposit of Cash in lieu of Security-Bond for Good Behaviour.] The powers given by ss. 505 and 506 of Act X of 1872 should be

exercised with extreme discretion; the former of these sections is not intended to apply to persons of "by no means a reputable character."	
An order requiring persons to deposit cash in lieu of entering into a bond as security for their future good behaviour, is bad in law.	
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The widow of an Armenian, married before the Dower Act (XXIX of 1839), is entitled to dower out of lands which her husband held during the marriage for an estate of inheritance, as against a Hindu purchaser for value from the husband during his life, the English law of dower having been recognized in this country amongst Europeans and Armenians as a branch of the law of inheritance.	
<i>Per</i> GARTH, C. J.—Estates which have been held by British subjects under the name of freehold estates of inheritance, are, in all essential respects, the same estates which have been held in England under the same name.	
The case of <i>The Mayor of Lyons v. The East India Co.</i> does not mean to decide that the Courts of this country are justified in adopting just so much of the law of inheritance, or of dower, or of any other law, as they consider equitable, and rejecting the rest. It only points out that there are certain portions of the English	

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Statute law which from their very nature were only passed for reasons connected with England, and which would not be applicable in India or any Colony of the British Crown,—e.g., the Mortmain Acts, the Law of Aliens, and the like.

The provisions of s. 4 of the Succession Act are prospective, and leave rights unaffected which had already been acquired before the Act passed.

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— *Limitation, Plea of—Limitation Act (XV of 1877), s. 26—Presumption of a Grant.*] In a suit to establish an easement when limitation is pleaded, the proper issues to frame under s. 26 of Act XV of 1877 (Limitation Act) are:—

(i) Whether the easement in question was peaceably, openly, and as of right enjoyed by the plaintiff, or those through whom he claims, within two years of the institution of the suit; and

(ii) in the event of the above issue being found in the negative, whether there is evidence of enjoyment on the part of the plaintiff, or those through whom he claims, of such a character and duration as to justify the presumption of a grant or other legal origin of the plaintiff's right independent of the provisions of Act XV of 1877, s. 26.

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ENHANCEMENT—Assessment of Rent—Decree for Rent at Enhanced Rate—Beng. Act VIII of 1869.] On the 25th of January 1864, the plaintiffs obtained a decree against the defendants for assessment of enhanced rent. Shortly afterwards, the defendants executed a *kabuliat*, at a reduced rate, for eleven years ending the 31st Assin 1282 (16th October 1875). After the term had expired, the plaintiffs sought to recover rent from the defendants at the rate settled by the decree of 1864.

Held, that the decree had been superseded by the subsequent arrangement, and that the plaintiffs could not recover rent at an enhanced rate, except under the provisions of Beng. Act VIII of 1869.

NOBIN CHUNDER SIRCAR v. GOUR CHUNDER SHAHA ... 759

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ESTOPPEL—*Admissions by Conduct.*] The deed of conveyance of land in Calcutta recited that the vendor was "seised of, or otherwise well entitled" to, the property intended to be sold "for an estate of inheritance in fee-simple," and it purported to convey such an estate. In a suit for dower by the vendor's widow against the heirs of the purchaser,—

Held, that although, as between the plaintiff and the defendants, there was no estoppel which could prevent the defendants from proving that the estate sold was other than an estate in fee-simple, yet, as the purchaser bought the property as and for an estate of inheritance and paid for it as such, the recital was *prima facie* evidence against the purchaser and persons claiming through him, that the estate conveyed was what it purported to be, it being an admission by conduct of parties, which amounted to evidence against them.

SARKIES v. S. M. PROSONOMOYEE DOSSEE 794*

BY PLEADINGS—*Ejectment Suit—Denial of Tenancy—Change of Defence on Appeal—Occupancy Right.*] It is not open to a defendant to change the whole nature of his defence at the last moment, and to set up in a Court of appeal a plea which he has directly and fraudulently repudiated in the Court below.

In an ejectment suit, the defendants, from whom the plaintiff alleged that he had purchased the land from which he sought to eject them, and who had before suit by parol disclaimed the plaintiff's title, set up in their written statement an adverse title in themselves. The lower Court found the plaintiff's allegation to be true.

Held, that the defendants were estopped from contending on appeal that they were occupancy-ryots, and therefore not liable to be ejected; and that by their own conduct they had forfeited the rights which they claimed.

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—*Documents upwards of Thirty years old—Proof of—Evidence Act (I of 1872), s. 90.*] A Court is not bound to accept as genuine the signature on a document upwards of thirty years old, even though it be produced from proper custody. Before accepting such document as proof of title, the Court must satisfy itself that the person who purports to have affixed his signature to the document was a person who at the time was entitled to grant such a document.

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—*Secondary Evidence of Contents of Document.*] By the law of evidence administered in England, which has been in a great measure, with respect to deeds, made the law of India, the first condition of the right to give secondary evidence of the contents of a document not produced in Court, is the accounting for the non-production of the original.

BHUBANESWARI DEBI v. HARISARAN SURMA MOITRA ... 720

—*Summoning Witnesses—Refusal of a Magistrate to summon Prisoner's Witnesses—Criminal Procedure Code (Act X of 1872), s. 359.*] A Magistrate is not at liberty to refuse to summon a witness tendered by an accused person, except on the grounds

specified in s. 359 of the Criminal Procedure Code; and if he does refuse, he is bound to proceed under that section. The fact that the accused declines to examine a witness is no reason for refusing to summon him to meet fresh evidence given subsequent to the defence being closed.

IN THE MATTER OF THE PETITION OF DEELA MAHTON v. SHRO
DYAL KOBRI 714

EVIDENCE, ADMISSIBILITY OF—*Judgment in Civil Suit out of which Criminal Prosecution arises.*] In suit by A against the obligors of a bond, the Court held, for the reasons stated, in its judgment, that the signatures of the obligors were not genuine, and directed the prosecution of A on a charge of forgery. On the trial of A before a jury, this judgment of the Civil Court was put in evidence on behalf of the prosecution, and its contents commented on by the Sessions Judge in his charge to the jury.

Held, that this judgment had been illegally admitted.

GOGUN CHUNDER GHOSE v. THE EMPRESS 247

—*Receiving Illegal Gratification.*—

Penal Code (Act XLV of 1860), ss. 161, 165—Evidence of Subsequent but Unconnected Receipt, showing footing on which Parties stood—Evidence Act (I of 1872), ss. 5—13 & 14.] The accused was charged with having received illegal gratification from C. and Co. on three specific occasions in 1876. In 1876, 1877, and 1878, C. and Co. were doing business as commissariat contractors, and the accused was the manager of the Commissariat office. *Held*, that evidence of similar but unconnected instances of receiving illegal gratifications from C. and Co. in 1877 and 1878 was not admissible against him under ss. 5 to 13 of the Evidence Act.

Held, per GARTH, C. J. (MACLEAN, J., concurring), the evidence was not admissible under s. 14.

Per GARTH, C. J.—Section 14 applies to cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it; not to cases where the question of guilt or innocence depends upon actual facts, and not upon the state of a man's mind or feeling.

Per MITTER, J.—If the receipt of the illegal gratifications mentioned in the charge be considered proved by other evidence, and if it were necessary to ascertain whether the accused received them as a motive for showing favor in the exercise of his official functions, the alleged transactions of 1877 and 1878 would be relevant under s. 14, but they would not be relevant to establish the fact of payments in 1876.

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ss. 13, 40, 41, 43—*Admissibility in Evidence of Judgments not "inter partes."*] *Per GARTH, C.J., JACKSON, PATTIFEX, and MORRIS, J.J. (MITTER, J., dissenting).*—A former judgment, which is not a judgment *in rem*, nor one relating

to matters of a public nature, is not admissible in evidence in a subsequent suit, either as a *res judicata*, or as proof of the particular point which it decides, unless between the same parties or those claiming under them.

In a suit between *A* and *B*, the question was, whether *C* or *D* was the heir of *H*. If *C* was the heir of *H*, then *A* was entitled to succeed; otherwise not. The same question had been raised in a former suit brought by *X* against *A*, and decided against *A*; and this former judgment was admitted in evidence in the suit between *A* and *B*, and dealt with by the Courts below as conclusive evidence against *A* upon the point so decided.

Held (MITTER, J., dissenting), that the former judgment was not admissible as evidence in the suit between *A* and *B*, either as "a transaction" under s. 13, or as "a fact" under s. 11, or under any other section of the Evidence Act.

GUJJU LALL v. FATTER LALL 171

EVIDENCE ACT (I of 1872), ss. 25, 26—*Admission made to Police Officer before Arrest.*] An admission made by an accused person to a Police officer before arrest is admissible in evidence.

THE EMPRESS v. DABEE PERSHAD 530

—, ss. 30, 138—*Confession—Admission—Examination of Witnesses—Judge—Penal Code (Act XLV 1860), ss. 114, 149, and 302.*] A prisoner, charged together with others with being a member of an unlawful assembly, made a statement before the Committing Magistrate implicating his fellow-prisoners and another person. He subsequently withdrew this statement, and made another, in which he endeavoured to exculpate himself.

Held, that this statement was not evidence against the other prisoners under s. 30 of the Evidence Act. It was not a confession, nor did it amount to any admission by the prisoner that he was guilty in any degree of the offence charged; but it was simply an endeavour on his part to explain his own presence on the occasion in such a manner as to exculpate himself, and any mention made by him in such a statement of other persons having been engaged in the riot, was altogether irrelevant, and not evidence against them.

At a trial before a Sessions Court, the Judge, on the examination-in-chief of the witnesses for the prosecution being finished, questioned the witnesses at considerable length upon the points to which he must have known that the cross-examination would certainly and properly be directed.

Held, that such a course of procedure was irregular, and opposed to the provisions of s. 138 of the Evidence Act.

It is not the province of the Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question or questions; and the Court should, as a general rule, leave the witnesses to the pleaders to be dealt with as laid down in s. 138 of the Act.

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—, s. 33—*Evidence of Witness taken upon Commission when admissible in Criminal Trial—High Courts' Criminal Procedure Act (X of 1875), s. 76—Presidency Magistrates' Act (IV of 1877), s. 158.*] The evidence of a witness taken upon commission is not admissible in a criminal trial held before the High Court, unless it can be shown that such evidence was so taken upon an order made by that Court under s. 76 of Act X of 1875, or unless it is admissible under s. 33 of the Evidence Act.

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EVIDENCE ACT (I of 1872), s. 33—"Incapable of giving Evidence." The incapacity to give evidence mentioned in s. 33 of the Evidence Act need not be a permanent incapacity.

IN THE MATTER OF THE PETITION OF ASGUR HOSSEIN.

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... s. 90.

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... s. 91—False Evidence in Judicial

Proceeding—Deposition of the Accused when admissible as Evidence—Civil Procedure Code (Act X of 1877), ss. 178, 182, 183, and 647.] Failure to comply with the provisions of ss. 182 and 183 of Act X of 1877 (Civil Procedure Code) in a judicial proceeding, is an informality which renders the deposition of an accused inadmissible in evidence on a charge of giving false evidence based on such deposition; and under s. 91 of Act I of 1872 (Indian Evidence Act), no other evidence of such deposition is admissible.

IN THE MATTER OF THE PETITION OF MAYADEB GOSSAMI.

THE EMPRESS V. MAYADEB GOSSAMI ... 762

... s. 92, PROVISOR 3—*Parol Evidence in addition to condition in Kistibundi—Part Performance of portion of obligation in Kistibundi.]* Per GARTH, C. J.—Where, at the time of the execution of a written contract, it is orally agreed between the parties that the written agreement shall not be of any force until some condition precedent has been performed, the rule that parol evidence of such oral agreement is admissible to show that the condition has not been performed, and consequently that the contract has not become binding, cannot apply to a case where the written agreement had not only become binding, but had actually been performed as to a large portion of its obligations.

The true meaning of the words "any obligation" in the 3rd proviso to s. 92 of Act I of 1872 is any obligation whatever under the contract, and not some particular obligation which the contract may contain.

JUGTANUND MISSEER V. NERGHAN SINGH ... 433

... s. 92, PROVISOR 1—6.

See SPECIFIC PERFORMANCE ... 328

EXAMINATION OF ACCUSED—Sessions Judge—Code of Criminal Procedure (Act X of 1872), ss. 243, 250, 264, 265.] The authority given to a Sessions Court to examine an accused does not contemplate the cross-examination of such accused, nor can the Judge endeavour, by a series of searching questions, to force the accused to criminate himself. The real object involved in the power given to the Court under s. 250 of the Code of Criminal Procedure is to enable the Judge to ascertain from time to time from the accused (especially if he be undefended) such explanation as he may desire to give regarding any statement made by the witnesses, or, at the close of the case for the prosecution, to elicit from the accused how he proposes to meet such portions of the evidence which, in the opinion of the Court, implicates the accused in the commission of the offence with which he stands charged.

HOSSEIN BUKSH V. THE EMPRESS ... 96

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See WITNESSES ... 774

EXCISE—Sale by Wholesale—Sale by Servant—Beng. Act VII of 1878, ss. 15, 59, and 60.] A sale of more than twelve quart bottles,

or two gallons of spirituous or fermented liquors of the same kind, made at one transaction, is a sale by wholesale.

Quære.—Whether a sale of twelve quart bottles of one kind of liquor, and three quart bottles of another kind, at the same time, comes within the prohibition in the explanation clause of s. 15.

The licensed retail vendor himself is the only person liable to conviction under s. 60.

THE EMPRESS V. NUDDIAR CHAND SHAW ... 832

EXECUTION—*Relief asked for in accordance with Statements in Plaint not forming a separate Prayer in the Plaint—General Prayer for Relief—Control of Execution.*] *A*, a joint owner of an estate with *B*, saved the joint estate from sale for arrears of Government revenue, in payment of which *B* had made default, for such purpose mortgaging her share in the estate to *E*. *A* then sued *B* for contribution. Pending that suit, *B* again made default, and the estate was sold and purchased by *C*, subject to incumbrances. Subsequently, *A* obtained her decree against *B*, and assigned her decree to *D*, who obtained an order for execution, and attached certain property belonging to *B*. *D* and *E* then entered into an agreement with *C*, that they would release *C* and the share charged with payment of *A*'s decree, from all liability, and that they would entrust the whole conduct of the execution-proceedings to *C*, in consideration of his granting a perpetual lease of part of the property to *D* and *E*. In pursuance of this agreement, *D* and *E* granted a release to *C*, and *C* granted a lease to *E* for himself, and it was contended, also, as benamidar of *D*. The agreement contained a proviso that should the Court, in which the decree should be executed, of its own accord or on the petition of *B*, or his legal representative, notwithstanding objection on the part of *D* and *E*, make any order directing the decree to be executed against the estate, then in such case *D* and *E* should not be bound by the release, and that it should be open to *C* to cancel the agreement. *D* applied for execution against the estate of the adopted son of *B* (who had died), but subsequently abandoned all proceedings and transferred his decree to the High Court to obtain execution against a house belonging to *C*, in Calcutta. The adopted son and widow of *B*, in a suit brought against *C* and *D*, objected to the execution-proceedings, and after paying the sum due to *D* into Court, asked for an injunction staying all further proceedings in execution until the hearing of the suit.

Held, that *D* had obtained, out of the lien directed by the decree, some benefit or advantage, which the plaintiffs might have a right to have valued at the hearing, and that, notwithstanding this did not form the subject of a separate prayer in the plaint, the Court would grant the injunction.

KRISTO MOHINEY DOSSEE V. KALLY PROSONNO GHOSE ... 485

OF DECREE—*Civil Procedure Code (Act X of 1877), ss. 248 and 311.*] When a judgment-debtor has died after decree, but before application has been made to execute the decree, the Court, before directing the attachment and sale of any property to proceed, must issue a notice to the party against whom the execution is applied for to show cause why the decree should not be executed against him, and its omission to do so will invalidate the entire subsequent proceedings.

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RAMESURI DASSEE V. DOORGADASS CHATTERJEE ... 103

Civil Procedure Code (Act X of 1877), s. 234—*Representative of Deceased Husband's Estate—Form of*

Decree against Hindu Widow.] A Hindu widow instituted a suit to recover possession of certain property belonging to her deceased husband, and that suit was dismissed with costs. The widow having died before execution for the costs was taken out, the decree-holder sought to take out execution against the next heirs of the late widow's deceased husband. *Held*, that the fact, that the widow did not in her suit seek to recover any interest personal to herself, but that she contracted the judgment-debt in the effort to recover a portion of her husband's estate, to which in its entirety the next heirs of her late husband had succeeded, was sufficient to make the whole estate liable, and would entitle the decree-holder to satisfy his decree against "the legal representatives" of the late widow's husband, under s. 234 of Act X of 1877.

In a decree against a Hindu widow, it should be stated whether the decree is a personal decree, or one against her as representing her deceased husband.

RAMKISHORE CHUCKERBUTTY v. KALEYKANTO CHUCKERBUTTY... 479

*EXECUTION OF DECREE—*Court which passed the Decree*—Civil Procedure Code (Act X of 1877, as amended by Act XII of 1879), ss. 223, 649—*Limitation Act* (XV of 1877), sched. ii, art. 179, cl. 4.] *Per* GARTH, C.J.—Section 649 of the Civil Procedure Code, as amended by Act XII of 1879, which explains the meaning of the expression the "Court which passed the decree," does not exclude the Court which originally passed the decree as being a Court in which an application for execution should be made, but merely includes another Court.

When, therefore, a Court which has passed a decree has ceased to have jurisdiction to execute it, the application for execution may be made either to that Court, although it has ceased to have jurisdiction to execute the decree, or to the Court which (if the suit wherein the decree was passed were instituted at the time of making application to execute it) would have jurisdiction to try the suit.

Per FIELD, J.—A Court does not cease to be "the Court which passed the decree" merely by reason that the head-quarters of such Court are removed to another place, or merely because the local limits of the jurisdiction of such Court are altered.

An application for the transfer of a decree under the provisions of s. 223 and the following section of Act X of 1877, is a step in aid of the execution of the decree within the meaning of cl. 4, art. 179, sched. ii of Act XV of 1877.

LATCHMAN PUNDEH v. MADDAN MOHUN SHYE ... 513

—*Satisfaction, plea of, in Bar*—Civil Procedure Code (Act X of 1877), ss. 244 and 258.] Where a decree-holder, declared to be entitled to possession of certain land, subsequent to decree executed a patta in favor of his judgment-debtor, who was then in possession, and afterwards took out execution under his decree,—

Held—on an objection by the judgment-debtor that, under these circumstances, he was not entitled to possession—that satisfaction of the decree not having been entered up, such objection could not be dealt with under ss 244 of the Civil Procedure Code.

Held also, that s. 258 of the Civil Procedure Code deals with the adjustment of any decree, and not merely with the adjustment of a money-decree.

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*See SALE BY SHERIFF IN EXECUTION OF DECREE. REVIVOR.

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----- OF MORTGAGE-DECREE — <i>Beng. Act VII¹ of 1868—Sale of mortgaged Property—Surplus Sale-proceeds—Attachment of Surplus Sale-proceeds.</i>]	
The purchaser of property, sold subject to the incumbrances thereon, at a sale under Beng. Act VII of 1868, subsequently became the purchaser of a decree passed prior to the sale in a suit upon a mortgage of the property, such decree being declared not only a charge on the mortgaged property, but also personal against the mortgagor.	
<i>Held</i> , that the purchaser was not entitled to execute the decree against the surplus sale-proceeds under such sale, although he abandoned his lien on the property.	
GOLUK CHUNDER MAHINTA <i>v.</i> SUBBOMANGALA DABI ...	711
EXECUTION-PROCEEDINGS— <i>Mesne Profits—Amount awarded in Execution larger than that claimed in Plaintiff—Court Fees Act (VII of 1870), s. 11, para. 2.</i>]	
The plaintiff brought a suit for possession, and for a certain sum as mesne profits, which he assessed at three times the annual rent paid to the defendant by tenants in actual possession of the land. He obtained a decree for possession, and the decree ordered that the amount of mesne profits due to him should be determined in the execution-proceedings. On an investigation, a larger sum was found to be due to him for mesne profits than that claimed by him in his suit. The plaintiff, therefore, paid the excess fee as provided by para. 2 of s. 11 of Act VII of 1870; but <i>held</i> , the amount of mesne profits recoverable by him must be limited to the amount claimed in the plaint.	
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GUARDIAN AND MINOR— <i>Application for Certificate—Grounds for Refusal—Right of Appeal—Act XL of 1858, s. 28.</i>]	
An application for a certificate under Act XL of 1858 (which, if successful, would, in effect, prolong the minority of an infant from eighteen to twenty-one), should not be granted when the alleged minor is admittedly on the point of attaining the age of eighteen, unless under particular circumstances, as where very great weakness of mind is proved, or where it is shown that there is some absolute necessity for making such order.	
Any person who, being a party to proceedings taken under Act XL of 1858, is injuriously affected by an order passed thereon, is, under s. 28 of that Act, entitled to an appeal.	
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HIGH COURT, APPELLATE SIDE— <i>Jurisdiction to execute Decrees—Civil Procedure Code (Act X of 1877), s. 649.</i>]	
Although the High Court in its Appellate Side does not, as a general rule, execute its own decrees or orders, yet this circumstance in no way affects the vitality of its jurisdiction in this respect, and it cannot therefore be included among Courts which have ceased to have jurisdiction to execute decrees as specified under s. 649 of the Code of Civil Procedure.	
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LAW— <i>Adoption among Sudras—Execution of Mutual Deeds—Actual giving and taking of Child.</i>]	
Although it has been held that, in the case of Sudras, no ceremonies except the giving and taking of the child are necessary to an adoption, yet it is not to be taken for granted, that such giving and taking can be completed by the execution of mutual deeds without more; but, <i>semble</i> , that, according to Hindu usage which the Courts should accept as governing the law, the giving and taking in such an adoption ought to take place by the father handing over the child to the adoptive mother, the latter intimating her acceptance of the child in adoption.	
In this case it was found on the evidence, that it was not the intention of the parties to complete the adoption by the mere execution of the deeds.	
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<i>Adoption of Grandnephew—Reflection of a Son—Appointment.</i>]	
A grandnephew may be validly adopted under Hindu law.	
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INSOLVENT ACT (11 and 12 Vict., c. 21), s. 23— <i>Reputed Ownership—Possession, Order, or Disposition—Consent of True Owner—Partner out of Jurisdiction—Mortgage of Chattels—Priority.</i>] In 1878, the members of the firm of <i>A and Co.</i> mortgaged the live and dead stock, chattels, and effects belonging to the firm to <i>B</i> , the mortgage deed containing a clause to the effect that as long as there was anything due on the mortgage, the mortgaged property should be treated and considered as the property, and in the order and disposition, of the mortgagee. <i>A and Co.</i> subsequently obtained further advances from <i>B</i> : at this time <i>A</i> was residing out of the jurisdiction of the Court, and the instruments creating the further charges were signed by his attorney. <i>C and D</i> , the two members of the firm residing in Calcutta, remained in possession of the mortgaged property up to the 10th May 1880, when they became insolvent, and their property was vested in the Official Assignee, who entered into possession. On the 12th May the mortgagee also	

entered into possession. On the 26th June, *A*, the remaining partner of the firm, returned to Calcutta and filed his petition of insolvency.

Upon a petition by the mortgagee claiming to be paid his mortgage-money in priority to the other creditors of the firm,—

Held, that the goods and chattels of the firm which were covered by the mortgage and further charges did not vest in the Official Assignee upon the insolvency of *C* and *D*.

IN THE MATTER OF MORGAN. *E. S. GUBBOY v. A. B. MILLER* . 633

INSOLVENT ACT (11 and 12 Vict., c. 21), s. 51—*Deferring Personal Discharge.*] The words in s. 51 of the Insolvent Act relating to debts contracted—"without having any reasonable or probable expectation at the time when contracted of paying them"—are pointed, not at the case of a man who incurs a debt knowing that he cannot pay his debts generally, but at that of a man who incurs a debt knowing that he cannot repay that debt. The words in the same section—"if it shall appear that the insolvent's whole debts so greatly exceeded his means of providing for the payment thereof during the time when the same were in course of being contracted, reference being had to his actual and expected property as to show gross misconduct in contracting the same,"—apply not to this or that debt, or class of debts, but to all the debts contracted for some years past. And under the circumstances of the case afford ground not for excepting any specified debt under s. 51, but for deferring the discharge under s. 47.

The insolvents carried on business as bankers and commission agents, receiving the money of their constituents, on deposit, for investment or for remittance, charging a commission on each transaction, and allowing 4 per cent. interest on deposits. An opposing creditor, one of their constituents, sent them in April 1879 a letter instructing them to invest Rs. 40,000 in Municipal debentures. The insolvents failed in November, and it was found on the evidence that they could not have procured the desired quantity of Municipal debentures without paying more than the market-price for them. They purchased Rs. 18,000 worth of such debentures, and were debtors to the opposing creditor for the balance. *Held*, that the money was in their hands as bankers and not as agents; and this being so, they were not bound to keep the Rs. 40,000 separate from their own funds, nor even after the letter received in April to set it apart for investment.

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Right of Way—How far finding of Magistrate thereon binding on Civil Court—Code of Criminal Procedure (Act X of 1872), ss. 521, 523, 530—Estoppel.] A Civil Court is not competent to set aside the order of a Magistrate made under s. 521 of the Code of Criminal Procedure, on the ground that such order was made without jurisdiction, because the land in respect of which the order was made is private property, and not a thoroughfare or public place. A Civil Court can, however, irrespective of an order made under s. 521 by a Magistrate, try the question, whether the land which formed the subject of such order is private property, and not a thoroughfare or public place, as between the parties to such suit and those who claim under them.

Per FIELD, J.—A person who, on receipt of an order made by a Magistrate under s. 521 of the Code of Criminal Procedure, declaring the existence of a right of way over such person's lands, demands, under s. 523 of the same Code, the appointment of a jury to try whether such order was reasonable, is not by such action estopped from afterwards bringing a suit in a Civil Court, seeking to establish his right to the exclusive enjoyment of the same lands.

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tuted in the Court of the lowest grade competent to try it," does not affect the jurisdiction of a Subordinate Judge to try a suit wherein several causes of action are joined, the cumulative value of which is over Rs. 1,000; notwithstanding that, if separate suits had been brought on these several causes, such suits must have been instituted in the Court of the Munsif.	
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LANDLORD AND TENANT— <i>Forfeiture of Holding—Denial by a Tenant of his Landlord's Title.</i>] <i>A, a ryot with rights of occupancy, in a rent-suit brought against him by B, the purchaser of an aima mehal, denied the existence of the relationship of landlord and tenant between himself and B, on the ground that the lands occupied by him were not included on the aima mehal purchased by B. B's rent-suit having been dismissed for failure of evidence on this point, B afterwards brought a regular suit to evict A, and for mesne profits. Held that A, by denying the title of B, in the rent-suit, thereby forfeited his rights of occupancy, and became liable to eviction.</i>	
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LIMITATION—*Appeal, Time for—Final Order—Review—Civil Procedure Code (Act X of 1877), s. 206.*] Any order made upon an application for a review of judgment, except an order absolutely rejecting the application, becomes, if it in any way modifies or alters the original order, although the modification or alteration extends only to the rectification of a clerical mistake, the final order in the case; and the party aggrieved by the original decree is entitled, although the modification or alteration was made in his favor, to treat the order upon review of judgment as the final decree or order in the case, and if it was made by a Court, an appeal from which lies to the Court of a District Judge, he is entitled to prefer his appeal at any time within thirty days from its date.

When an application for a review of judgment is made upon several grounds, one of which refers only to the question of adjudication of costs, and the Court to whom the application is made holds all the other grounds to be untenable, but is of opinion that there has been a clerical mistake in that part of its order or judgment which refers to costs, it may reject the application absolutely and permit the applicant to apply, under s. 206 of the Civil Procedure Code, for a rectification of the clerical mistake; but if it does not do so, but, on the application for a review of judgment, amends the clerical mistake in its original order, the decree drawn up in conformity to this order becomes the final decree, and an appeal will lie against it if brought within the time prescribed for bringing an appeal against any other similar decree.

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Suit for Arrears of Rent—Beng. Act VIII of 1869.]

The last day on which a suit for the recovery of arrears of rent can be instituted under s. 29, Beng. Act VIII of 1869, is the last day of the third year from the close of the year in which the rent became payable.

The word "arrear" in that section means "rent in arrear."

KASIKANT BHUTTACHARJI v. ROHINIKANT BHUTTACHARJI	325
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—*Suit to recover Possession of Land taken by Municipal Commissioners—Beng. Act III of 1864, s. 87.*] Section 87 of Beng. Act III of 1864 is applicable only in those cases where the plaintiff claims damages or compensation for some wrongful act committed by the Commissioners or their officers, in the exercise, or honestly supposed exercise, of their statutory powers.

The notice in the earlier part of the section is meant to give the defendant an opportunity of making some pecuniary amends for the wrong without incurring the cost of litigation.

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—*Possession, Suit for—Limitation Act (XV of 1877), sched. ii, art. 47.*] In a dispute between A and B concerning the possession of a certain *jaluq*, the Criminal Court made an order under s. 530 of the Code of Criminal Procedure retaining B in possession; and this order was, in a proceeding under ss. 296, 296 of the Code of Criminal Procedure, confirmed by the Court of Session. *Held*, that a suit by A for the recovery of the land must be brought within three years from the date of the Magistrate's order, and not from the date of the order passed by the Court of Session.

Article 47 of sched. ii, Act XV of 1877, refers to immoveable as well as moveable property.

KANGALI CHURN SHA *v.* ZOMURUDONNISSA KHATOON ... 709

LIMITATION—*Suit by Mortgagee for Possession after Foreclosure—Limitation Act (IX of 1871), sched. ii, arts. 135, 145.* In a suit by a mortgagee to obtain possession after foreclosure instituted more than twelve years after such mortgagee had, upon default, become, under the words of the deed, entitled to possession, but within twelve years of the date of the expiry of the year of grace granted under the foreclosure proceeding, *held*, under s. 145 of the Limitation Act, IX of 1871, that the period of limitation must be calculated from the date of the expiry of the year of grace, and not from the time when the default was first made.

BURMAMOYE DASSEE *v.* DINOBUNDHOO GHOSE ... 564

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LIMITATION ACT (IX OF 1871), s. 20—Acknowledgment—Repeal of Act—Revival of Right to sue—Authorized Agent—Signature—Civil Procedure Code (Act VIII of 1859), s. 4. The law of limitation governing a suit for a debt, is that law which is in force at the date of its institution.

As far as regards debts, the Indian laws of limitation merely bar the remedy, but do not extinguish the right.

Acknowledgments which under Act XIV of 1859 were insufficient to keep alive a cause of action, because they were signed only by an agent, *held* to be sufficient to sustain a suit on the same cause of action under Act IX of 1871.

Where a series of acknowledgments of a debt have been made, each within three years of the one next preceding, and the first of the series has been made within three years of the date on which the debt was contracted, a suit for the recovery thereof is, under Act IX of 1871, in time, if instituted within three years from the date of the last acknowledgment.

Discussion as to who is an authorized agent, what is a sufficient signature, and what amounts to a sufficient acknowledgment, within the meaning of s. 20 of Act IX of 1871.

Under s. 20 of Act IX of 1871, the authorized agent may sign either his own name or that of his principal.

MOHESH LAL *v.* BUSUNT KUMAREE ... 340

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... SCHED. II, ART. 15.] The period of limitation prescribed by art. 15, sched. ii, Act IX of 1871, for a suit to set aside an order of a Civil Court, does not apply where the order simply amounts to a declaration that the Court considers it has no jurisdiction to act in the proceeding before it.

KRISTODASS KUNDOO *v.* RAMKANT ROY CHOWDHRY ... 142

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See SUIT FOR POSSESSION ... 725

LIMITATION ACT (IX OF 1871), s. 27, SCHED. II, ART. 167.] The period of limitation within which application must be made for execution of an order for costs passed by the High Court, when rejecting a petition for leave to appeal to the Privy Council, is that specified in sched. ii, art. 167 of Act IX of 1871.

HURRO PERSHAD ROY CHOWDHRY v. BHUPENDRO NARAIN DUTT 201

----- (XV OF 1877), s. 19.

See ACKNOWLEDGMENT OF DEBT 447

-, ss. 20, 22.

See PARTIES 815

-----, s. 26.

See EASEMENT, 812

-----, SCHED. II, ART. 47.

See LIMITATION 709

-----, ART. 66.

See BOND 239

-----, SCHED. II, ARTS. 66 AND 116.

Registered Bond—Compensation for Breach of Contract.] A suit to recover money due upon a registered bond is a suit for compensation for breach of contract in writing registered, within the meaning of art. 116 of sched. ii to Act XV of 1877, and must be brought within six years from the time when the period of limitation would begin to run against a suit brought on a similar contract not registered.

NOBOCOMAR MOOKHOPADHAYA s. SIRU MULICK 94

-----, ART. 85.

See ACKNOWLEDGMENT OF DEBT 447

-----, ARTS. 99, 132—*Suit*

for Share of Government Revenue, and for Declaration that Estate is charged with amount.] A suit for recovery of Government revenue, which the defendant was bound to pay, but which has been paid by the plaintiff to save the whole estate from sale, where the plaintiff asks to have the amount so paid made a charge on the portion for which he paid it, is governed by art. 132, and not by art. 99 of Act XV of 1877.

RAM DUTT SINGH v. HIRAKH NARAIN SINGH 549

-----, ART. 120—*Breach*

of Covenant in a Lease.] The defendant took certain land from the plaintiff under a registered lease, which contained a clause prohibiting the defendant from digging a tank on the land without the plaintiff's permission. The defendant having, nevertheless, constructed a tank without such permission, the plaintiff brought a suit to compel him to fill up the tank, or, in case he should fail to do so, for compensation.

Held, that the period of limitation applicable to such a suit was art. 120 of sched. ii of the Limitation Act.

KEDARNATH NAG v. KHEETURPAUL SRITIBUTNO 34

-----, ARTS. 142, 144.

See PERMISSIVE OCCUPATION 311

-----, ART. 178.

See APPLICATION FOR PROBATE 707

-----, --- *Applica-*

tion to revive a case and restore it to the Board.] After a decree had been made in a suit, the case was, in 1875, struck out of the

board for want of prosecution. No steps were taken to have it restored. In 1879 both the plaintiff and defendant died. In the same year the heirs of the plaintiff instituted a suit against the administrator of the defendant for the purpose of having the decree in the original suit carried out. This suit was dismissed by the Court of first instance under s. 13 of the Code of Civil Procedure, but the Appellate Court, holding that the original suit was subsisting and might be reconstituted, directed that the plaintiffs should be allowed to amend their plaint by putting it into the form of a petition under s. 372 of the Code. On a petition by the plaintiffs praying that the original suit might be revived and restored to the board,—

Held, that the application was not barred under art. 178 of sched. ii to the Limitation Act of 1877.

Even if art. 178 was applicable, the application would not be barred, limitation running from the time when the suit was allowed to be reconstituted.

The Legislature did not intend to include in the Limitation Act every application to a Court with reference to its own list of causes, such as applications to transfer a case from one board to another, to transfer a case to the bottom of the board, change of attorneys, and so forth.

GOVIND CHUNDER GOSWAMI v. RUNGUNMONEY ... 60

LIMITATION ACT (XV OF 1877), SCHED. II, ART. 179—*Execution of Joint Decree against two or more Defendants.* In a suit for possession of land brought by *A* against *B*, *C*, and *D*, a decree was passed on the 14th of April 1874 for possession and costs against *B*, *C*, and *D* jointly. This decree was afterwards reversed on an appeal by *B*, who alone claimed the property. *A* then preferred a special appeal to the High Court; and on the 29th June 1877, the decision of the Judge was reversed, and the decree of the Court of first instance restored.

On the 30th December 1878, *A* applied to the Court of first instance for execution to issue against *C* and *D* for the costs specified in the decree passed on the 14th April 1874. *C* and *D* successfully objected in the Court of first instance and the lower Appellate Court that more than three years having elapsed since the date of the decree, the decree for costs could not be executed, the application for execution being barred by art. 179 of sched. ii of Act XV of 1877. *Held*, on appeal to the High Court, that, inasmuch as *B*'s appeal had related to the whole case, and the decree obtained by him dismissing the suit would, if not reversed, have deprived *A* of his right to any costs at all, *A*, upon succeeding in getting the original decree restored upon special appeal to the High Court, was entitled to execute such restored decree at any time within three years of the order of the High Court.

MULLICK AHMED ZUMMA *alias* TETUR v. MAHOMED SYED ... 194

—, ART. 179, CL. 4. 513

See REVIVOR ... ART. 180.

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LUNATIC, ILLTREATMENT OF.

See ACT XXXV OF 1858 ... 539

MAHOMEDAN LAW—Husband and Wife—Maintenance—Decree for past Maintenance. In a suit for maintenance by a Mahomedan wife against her husband, where there was no decree or agreement for maintenance before suit,—*held*, reversing the decision of the

Court below, that the decree should not have awarded past maintenance, but that maintenance should have been made payable only from the date of the decree.

Held also, that future maintenance should have been given only during the continuance of the marriage, and not during the term of the plaintiff's natural life.

ABDOOL FUTTEH MOULVIN v. ZABUNNESSA KHATUN ... 631

MAHOMEDAN LAW—*Waqf—Construction of Deed of Endowment—Settlement on Person and his Descendants to three generations, and afterwards to Charity—Appropriations of Property by Settlement.*]
A Mahomedan settled a portion of his immoveable property as follows:—"I have made waqf of the remaining four annas in favor of my daughter B and her descendants, as also her descendants' descendants' descendants, how low soever, and when they no longer exist, then in favor of the poor and needy." *Held*, this settlement did not create a valid waqf.

To constitute a valid waqf, there must be a dedication of the property solely to the worship of God or to religious or charitable purposes.

Semble.—Appropriations in the nature of a settlement of property on a man and his descendants can only be treated as legitimate appropriations under the designation of waqf, where the term *sadukah* is used.

Even supposing they could be so treated, it would be necessary, in order to validate a waqf by making a settlement of property on himself or his descendants, for a man to reduce himself to a state of absolute poverty.

MAHOMED HAMIDULLA KHAN v. LOTFUL HUQ ... 744

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See ONUS OF PROOF ... 666

MALE DESCENDANTS, RESTRICTION OF GIFT TO.

See HINDU LAW ... 421

MARRIAGE EXPENSES OF GRAND-DAUGHTER.

See HINDU WIDOW ... 36

MARSHALLING.] The doctrine of marshalling does not apply as between a mortgagee and attaching creditors of the mortgagor who hold mere money-decrees.

KRISTODASS KUNDOO v. RAMKANT ROY CHOWDHRY ... 142

MEASUREMENT OF LANDS, ENFORCING ATTENDANCE OF WITNESSES FOR.

See BENG. ACT VIII OF 1869, ss. 38 AND 40 ... 673

MESNE PROFITS—*Civil Procedure Code (Act VIII of 1859), s. 259 —Certificate of Sale.*] The possession, with mesne profits, of land comprised in a *zur-i-peshgi* lease of the year 1851, was decreed to the *zur-i-peshgidars* in 1860; and litigation as to their rights under the lease was carried on till 1874, when, after their deaths, it ended in favor of their representatives. In 1869, one of the parties to that litigation obtained a decree for money against the *zur-i-peshgidars*; and in 1874, in execution of this decree, all the right, title, and interest of the representatives of the latter, in the lease of 1851, was sold to a third party.

Held (reversing the decision of the High Court), that the right to the mesne profits awarded by the decree of 1860 did not pass by the sale, but remained in the representatives.

GANESH LAL TEWARI v. SHAMNARAIN ... 213

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————— <i>Covenant not to Lease—Lease of Property mortgaged—Suit to set aside Lease.</i>]	
A mortgaged certain property to B, agreeing, amongst other things, not to grant in zurpeshgi or mortgage the property to any one so as to cause any difficulty in the realization of the money advanced under the mortgage-bond. A subsequently leased in zurpeshgi part of the property to C. B obtained a sale-decree against A on his mortgage, and at the sale himself became the purchaser of the property. He then brought a suit against C to set aside the zurpeshgi lease, and to obtain khas possession. <i>Held</i> , that the covenant in the mortgage-bond merely created a personal liability between A and B, and that the sale under B's mortgage-decree did not put an end to the zurpeshgi lease or affect the interests of the zurpeshgidar; that B's suit against C was wrong in form; and that his proper course was to sue to have his right declared to sell the property in satisfaction of his mortgage-debt, so as to give the zurpeshgidar an opportunity of redeeming.	
RADHA PERSHAD MISSEY v. MONOHAR DASS	317
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A mortgagee, who has obtained a decree for an account and sale, is not entitled to withdraw from the taking of accounts in his execution-proceedings, when those accounts appear to be going against him.	
DOOLEE CHAND v. OMDA KHANUM alias BABU SHUBIBU	377
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----- <i>Suit to have certain Lands declared Mal—Docu- mentation received without objection by lower Court.</i> Where it is admitted that the defendants hold certain lands within the plaintiff's zemindari, some at least of which are rent-paying; the defendants, if desirous of proving that any of these lands are rent-free, are bound to give some <i>primâ facie</i> evidence of the fact, before they can call upon the plaintiff, the zemindar, to prove that the whole or any part of the lands are mal.	
An Appellate Court has no right to refuse to admit on technical grounds a document which has been received and read in the Court below without objection.	
AKBUR ALI v. BHYSA LAL JHA	666
ONUS PROBANDI— <i>Mortgage-Bond—Proof of Execution and bonâ fides of Transaction—Evidence—Recital in Instrument</i> Where a claim is made under an alleged mortgage against a <i>bonâ fide</i> pur- chaser for value, and the defendant puts in issue the genuineness of the transaction, the onus is upon the plaintiff of proving <i>primâ facie</i> the <i>bona fides</i> as well as the actual execution of the mortgage; and if the Court discredits the plaintiff's witnesses as regards the <i>bona fides</i> of the transaction, it is at liberty to dismiss the suit, although the defendant gives no substantial evidence of fraud.	

A recital in a deed or other instrument is in some cases conclusive and in all cases evidence as against the parties who make it, and it is of more or less weight or more or less conclusive against them according to circumstances. It is a statement deliberately made by those parties, which, like any other statement, is always evidence against the persons who make it. But it is no more evidence as against third persons than any other statement would be.

BRAJESHWAR PESHKAR V. BUDHANUDDI ... 268

ORAL AGREEMENT, EVIDENCE OF.

See SPECIFIC PERFORMANCE ... 534

ORDER BY EXECUTIVE OFFICER—*Power of Judicial Courts to question the legality of such Order.*] Where an executive officer makes an order or issues a notification under the provisions of the Code of Criminal Procedure, it is not within the province of judicial authority to question the propriety or legality of such order or notification until an attempt is made to enforce the exaction of a penalty against a person committing a breach of such order or notification. It then becomes the duty of the judicial authority to consider whether the order is properly made or not.

IN THE MATTER OF THE PETITION OF SURJANARAIN DASS.

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TRANSFER—*Powers of High Court—Code of Civil Procedure (Act X of 1877), s. 25.*] The High Court cannot make an order of transfer of a case under s. 25 of the Code of Civil Procedure, unless the Court, from which the transfer is sought to be made, has jurisdiction to try it.

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See DISMISSAL OF COMPLAINT 523

*PARTIES—*Adding Plaintiffs in Actions of Contract—Nonjoinder—Joinder of Plaintiffs after time for bringing Suit has expired, Effect of—Co-Contractors—Limitation Act (XV of 1877), ss. 20 and 22—“Prescribed Period”—Procedure—Suit by Members of Joint Hindu Family carrying on Trade in Partnership.*] Two of the sons out of a joint Mitakshara family, consisting of a father and three sons and the widow and sons of a deceased son, and carrying on business in partnership, sued to recover money due on a bath-chitta, dated the 11th December 1876; the last payment made and entered by the defendant being on the 20th July 1877. No time was fixed for payment of the money, so that it became payable on the date of the bathchitta.

The suit was instituted on the 19th July 1880, and came on for hearing on the 26th July, when an objection was taken, that all the parties who ought to sue were not on the record. On the application of the original plaintiffs the names of the father and the third son were then added, and the plaintiffs were described as surviving partners of the deceased son. At the time the additional plaintiffs were made parties, the suit was, as regards them, barred by limitation.

Held, that the additional plaintiffs were rightly made parties to the suit, notwithstanding that the suit was, as far as they were concerned, barred.

In actions of contract it is the right of the defendant, if he takes the objection in proper time, to insist upon all the persons with whom he contracted being joined as plaintiffs, and if, after the objection has been raised, the plaintiff proceeds with the suit without taking steps to add the person or persons whose nonjoinder has been objected to, and the Court finds that the objection is well founded, the suit must be dismissed.

That, inasmuch as the original plaintiffs could only enforce their claim in conjunction with the added plaintiffs, and the added plaintiffs were barred by s. 22 of Act XV of 1877, the claim of the original plaintiffs was also barred.

That the suit, if all the plaintiffs had originally joined in suing, would not have been barred by s. 20 of Act XV of 1877. The words “prescribed period” in that section mean, not the period prescribed for the payment of the debt, but the prescribed period of limitation.

There is no equity, but often much injustice, in allowing one joint-contractor out of many to sue a defendant, notwithstanding an objection duly made by the latter; and the Court has no right to allow one contractor to recover under such circumstances, though he may, no doubt, afterwards adjust the sum which he recovers with his co-contractors.

As between the members of a joint family, any one or more may be authorized by the rest to act as their agent or agents in any business transaction; but when a joint family or any members of it carry on a trade in partnership, and contract with the outside public in the course of that trade, they have no greater privileges than any other traders. If they are really partners, they must be bound by the same rules of law for enforcing their contracts in Courts of law as any other partnership.

RAMSEBUK v. RAMLALL KOONDOL 815

—*Suit to cancel Undertenures—Act XI of 1859, s. 37.*] On the 13th January 1871, A and B purchased an estate sold for arrears of Government revenue. The original proprietors asserted

their right to collect the rents of a portion of the property by virtue of holding two shikmi talooks and a howla tenure. This right was affirmed by the High Court in April 1875. *B* had previously sold his interest to *C*. On the 29th May 1876, *A* created a patni of his eight annas in favor of *D* and *E*, and on the 4th July 1876, *C* purchased all the rights of the original proprietors. On the 18th January 1877, *A* sued under Act XI of 1859, s. 37, to cancel or vary the tenures, making the original proprietors, *C*, and various tenants, defendants. *C* objected that *A* had no right of suit or cause of action, as he had parted with all his rights to *D* and *E*; and that as his entire interest in the estate was only eight annas, he could not sue to cancel a part only of the sub-tenures. *D* and *E* then applied to be added as parties, and were made plaintiffs.

Held, that *A* had no cause of action, as he had previously parted with all his rights as zemindar, to cancel these tenures in favor of *D* and *E*, nor could *D* and *E* sue, as they were not "purchasers of an entire estate." That *A* having no cause of action it was not competent to the lower Court to add *D* and *E* as plaintiffs, and so introduce a right of action which did not previously exist; and

That, even on the assumption that *D* and *E* were properly made plaintiffs, the lower Appellate Court should have taken into consideration certain admissions made by them as to the existence of the undertenure, both before and after the Government sale.

DWARKANATH PAL v. GRISHCHUNDER BUNDOPADHYA ... 827

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PENAL CODE (Act XLV of 1860), ss. 114, 149, 302.

See EVIDENCE ACT, ss. 30, 138 ... 279

ss. 147, 148, 324.

See PRACTICE ... 718

ss. 161, 165.

See EVIDENCE ... 655

PENAL CODE, (Act XLV of 1860), s. 188—*Injunction in Civil Suit—Disobedience of Order.* Section 188 of the Penal Code applies to orders made by public functionaries for public purposes, and not to an order made in a civil suit between party and party.

The proper remedy for disobedience of an order of injunction passed by a Civil Court, is committal for contempt.

IN THE MATTER OF THE PETITION OF CHANDRAKANTA DE ... 445

-, ss. 192, 464, cl. 2—*Fabricating False Evidence—Forgery—Alteration of Date of Document.* Where the date of a document, which would otherwise not have been presented for registration within time, is altered for the purpose of getting it registered, the offence committed is not forgery, where there is nothing to show that it was done "dishonestly or fraudulently," within cl. 2, s. 464 of the Penal Code, but fabricating false evidence within s. 192.

IN RE MIR EKHAR ALI. THE EMPRESS V. MIR EKHAR ALI ... 482

-, s. 201—*False Information.* A woman who, with her infant child, eloped from her husband's house, was afterwards arrested on a charge of murdering the child, which was missing. She made three different statements; (1) that she had left it with her husband; (2) that she had been enticed away by one R., who had taken the child from her; (3) that one H. had drowned the child. The Sessions Judge believed the last statement, and convicted her under s. 201 of the Penal Code.

Held, that the conviction was wrong, and must be set aside.

Section 201 of the Penal Code does not apply to a case where the person, who is the probable or possible offender, makes statements exculpating himself by inculcating another.

IN THE MATTER OF THE PETITION OF BEHALA BIBI.

THE EMPRESS V. BEHALA BIBI ... 789

-, s. 211—*Prosecution for making a False Charge—Opportunity to Accused to prove the Truth of Charge.* Before a person can be put upon his trial for making a false charge under s. 211 of the Penal Code, he must be allowed an opportunity of proving the truth of the complaint made by him; and such an opportunity should be afforded to him, if he desires to take advantage of it, *not before the Police, but before the Magistrate.*

Magistrates should clearly understand that whilst the Police perform their proper duty in collecting evidence, it is the function of the Magistrate alone to decide upon the sufficiency or credibility of such evidence when collected.

THE GOVERNMENT V. KARINDAD ... 496

Charge made on Report of Police that Case was False—Charge of giving False Information. A commitment for trial under the provisions of s. 211 of the Penal Code, for knowingly instituting a false charge with intent to injure the persons accused, is not illegal, merely because the complaint which the accused made has not been judicially enquired into, but is based on the report of the Police that the case was a false one.

THE EMPRESS V. SALIK ROY, ... 582

Sanction to Prosecution for making False Charge. A sanction for a prosecution for making a false charge under s. 211 of the Penal Code, without hearing all the witnesses whom the person accused of making the false charge wishes to produce, is illegal.

The High Court has power to quash an illegal commitment at any stage of the case.

THE EMPRESS v. SHIBO BEHARA	...	...	...	584
PENAL CODE (<i>Act XLV of 1860</i>), s. 211— <i>Making False Charge to Court or Officer having no Jurisdiction.</i>] It is necessary for a conviction under s. 211 of the Penal Code that the false charge should have been made to a Court or officer having jurisdiction to investigate and send it up for trial.				

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—, s. 300, EXCEP. 5.

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PERMISSIVE OCCUPATION — *Limitation Act (XV of 1877), sched. ii, arts. 142, 144—Possession—Discontinuance.*] A suit for the recovery of immoveable property against a person who had originally been in mere permissive occupation or possession accorded on the ground of charity or relationship, is governed by Act XV of 1877, sched. ii, cl. 144, and not by cl. 142 of the same schedule.

In such a case the owner of the property, who has accorded the permissive occupation, cannot be said to have “discontinued” the possession.

GOBIND LALL SEAL v. DEBENDRONATH MULLICK	311
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PLEADERS AND MUKTEARS' ACT (XX OF 1865), ss. 11, 13—

Muktears and Private Agent, Distinction between.] Per WHITE and MITTER, JJ.—The mere fact that a person looks after an appeal and gives instructions to pleaders in connection with such appeal, does not show that such person was practising as a muktear within the meaning of s. 13 of Act XX of 1865.

* Per GARTH & C. J.—Where a person is in the habit of acting for persons in Courts of law, and holds himself out as ready to perform what is usually considered muktear's works, for reward, such person is no less acting as a muktear on any particular occasion, because he may have abstained on the particular occasion from doing any of those acts which a duly qualified muktear is alone legally capable of performing.

KALI KUMAR ROY v. NOBIN CHUNDER CHUCKERBUTTY	585
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POLICE ACT (V OF 1861), s. 29— <i>Overstaying Leave without Permission.</i> The failure of a Police constable to resume his duty on the expiration of his leave does not constitute an offence under s. 29, Act V of 1861.	
IN THE MATTER OF THE PETITION OF JANOKINATH GUPTA.	
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<i>See EVIDENCE ACT, ss. 25, 26</i>	530
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POWER OF HIGH COURT TO ORDER TRANSFER.	
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PRACTICE—Attorney and Client—Application to restrain Attorney changing sides.] An attorney who has acted for a party to a suit and has discharged himself, cannot afterwards act for the opposite party; and the Court will restrain him from doing so on an application made for that purpose.	
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———— Cumulative Sentence—Separate Charges—Criminal Procedure Code (Act X of 1872), s. 454, illus. (f)—Penal Code (Act XLV of 1860), ss. 147, 148, and 324.] Under s. 454 of the Criminal Procedure Code, the collective punishment awarded under ss. 147, 148, and 324 of the Penal Code must not exceed that which may be awarded for the graver offence.	
Quere.— Whether separate convictions under ss. 147 and 324 of the Penal Code are legal?	
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———— Verification of Plaintiff—Information and Belief—Personal Knowledge—Civil Procedure Code (Act X of 1877), ss. 50, 51—Act XII of 1879, s. 11.] In all cases, whether a plaintiff is verified by the plaintiff or by some other person, the party verifying should state shortly what paragraphs he verifies of his own knowledge, and what paragraphs he believes to be true from the information of others.	
IN THE MATTER OF UPENDRO LALL BOSE	675
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PRINCIPAL AND AGENT— <i>Duty of Agent to account—Procedure on taking Accounts in Mofussil—Pleading in Suit for Account—Access to Books and Papers—Civil Procedure Code (Act X of 1877), ss. 394, 395.</i> In a suit for an account against an agent, the plaint stated that the defendant had not submitted proper accounts of his agency, and prayed that the defendant might be ordered to produce certain papers, and that, on failure to submit the accounts, he might be decreed to pay the plaintiff Rs. 1,200 by way of damages. The plaint also alleged that, 'in consequence' of the defendant's negligence and mismanagement, the plaintiff believed that he had sustained a loss of Rs. 5,000, and prayed for a decree for this sum.	
<i>Held</i> , that no decree could be made for the sums mentioned, or any other sum, until an account had been taken and the amount due from the defendant ascertained.	
<i>Per</i> FIELD, J.—It is the duty of an agent to render proper accounts to his employer irrespective of any contract to that effect. And he does not discharge that duty by merely delivering to his employer a set of written accounts without attending to explain them, and produce the vouchers by which the items of disbursements are supported.	
Method to be followed on taking accounts in the Mofussil stated.	
If the taking of accounts by the Judge would occasion a waste of public time, he should resort to the provisions of ss. 394 and 395 of the Civil Procedure Code; and furnish the commissioner with such part of the proceedings and such detailed instructions as may appear necessary.	
In order to enable an agent to prepare accounts to be furnished to his principal, he should be allowed to have reasonable access, at proper times and in the presence of responsible persons, to such books and papers in the principal's possession as may be necessary for the preparation of the accounts.	
ANNODA PERSAD ROY <i>v.</i> DWARKANATH GANGOPADHYA ...	754
----- AND SURETY — <i>Giving Time — Interest paid in advance—Discharge of Surety—Accommodation Acceptor—Contract Act (IX of 1872), s. 135.</i> The drawer of hundis paid advance interest to the holder to obtain time, which he did obtain, for payment after due date. <i>Held</i> , that the liability of an accommodation acceptor of the hundis depended on whether he knew of and consented to this arrangement.	
<i>Held</i> on the merits, that he knew of, and consented to, advanced interest being taken.	
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PRIVILEGE—*Waiver—European British Subject—Criminal Procedure Code (Act, X of 1872), ss. 82 and 84.*] Section 84 of the Criminal Procedure Code must be construed strictly with s. 72, and before a European British subject can be considered to have waived the privilege conferred upon him by s. 72, it must appear that his rights under that section have been distinctly made known to him, and that he must have been enabled to exercise his choice and judgment whether he would or would not claim those rights.

The provisions of s. 72 of the Code of Criminal Procedure relating to the kind of Court which shall have jurisdiction and shall not have jurisdiction to enquire into a complaint or try a charge against a European British subject, constitute a privilege,—that is to say, they are not so much words taking away jurisdiction entirely, as words which confer on the British subject a right to be tried by a certain class of Magistrates and by no others, which right the Code enables him to give up.

No person can by waiver or consent enable a Magistrate or a Judge to try a case which he is disqualified to try by some circumstance not personal to the accused.

The waiver of privilege spoken of in s. 84 must be an absolute giving up of all the rights, with reference to chap. vii of the Code of Criminal Procedure, which a European British subject has; and the words 'dealt with as such before the Magistrate' mean everything contained in the chapter,—that is to say, the tribunal having cognizance of the case, the procedure, and also the punishment to which the accused would be liable.

IN THE MATTER OF THE PETITION OF QUIROS. THE EMPRESS v.

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PRIVY COUNCIL DEPARTMENT, ORDER BY JUDGE IN.

See APPEAL ... 594

PROBATE—*Application for Order revoking Probate—Attaching Creditor of Next-of-kin—Succession Act (X of 1865), s. 234.*] A judgment-creditor, who has attached property of his debtor, which purports to have been inherited by such debtor from his deceased father, may, where the will of such deceased is set up and proved at variance to his interests, apply for a revocation of the order granting probate of the will so set up.

IN THE MATTER OF THE PETITION OF NILMONEY SING.

UMANATH MOOKHOPADHYA v. NILMONEY SING ... 429

Caveat—Interest of Attaching Creditor—Next-of-kin—Mortgagees—Succession Act (X of 1865), s. 234, illus. (b), s. 242—20 and 21 Vict., c. 77, s. 61.] A, a judgment-creditor, attached certain property as belonging to B, his debtor. B was the next-of-kin of C, deceased. The widow of C applied for probate of an alleged will of her husband. On caveat entered by A, *held*, that he had such an interest as entitled him to oppose the grant.

D held a mortgage from B, executed subsequently to C's death, of other property, which the widow also alleged formed part of her husband's estate. On caveat entered by D, *held* also, that he had such an interest as entitled him to oppose the grant.

Per FIELD, J.—Under s. 242 of the Succession Act, any person who can show that he is entitled to maintain a suit in respect of

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property over which probate would have effect, possesses a sufficient interest to entitle him to enter a <i>caveat</i> and oppose the grant. °	
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REPRESENTATIVE—*Revivor of Suit—Substitution—Issue—Mortgage Decree—Hindu Widow—Party to Suit—Res Judicata—Code of Civil Procedure (Act X of 1877), ss. 13, 244.* Where the plaintiff in a suit prays that a person may be substituted on the record as the heir of a defendant who has died, the Judge should raise an issue as to whether the person sought to be substituted is the heir of the deceased defendant.

In 1872, *A* brought a suit on a mortgage against the mortgagor, a Hindu widow, who died pending the suit. *A* then applied that the suit should be revived against *B* as the representative of the defendant. *B* denied that he was such representative, but the Judge refused to go into the question, made *B* a party, and gave *A* a decree for the sale of the mortgaged property. *B* subsequently brought a suit to have it declared, *inter alia*, that the mortgage and decree only covered the widow's life-interest.

Held, that the suit was not barred either as *res judicata*, or under the provisions of s. 244 of the Code of Civil Procedure.

KANAI LALL KHAN v. SASHI BHUSON BISWAS ... 777

— OF DECEASED HUSBAND'S ESTATE.

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See SALE OF GOODS... 64

RES JUDICATA—*Intervenors—Rights as between original Defendant and Intervenors—Suit for Possession.* Where a plaintiff claimed certain property, and two persons intervened and were allowed to put in their claim to a portion of it, which claim, at the hearing, the intervenors, however, refrained from pressing, and the suit was decided in favor of the plaintiff, the original defendant alone appealing (unsuccessfully) against the decree,—

Held, that it was not open to the intervenors to institute any fresh proceedings to obtain the property against the original defendant: the decree in the suit in which they intervened being conclusive as between them and such defendant.

SHEO CHURN SINGH v. FAKER DOOBAY ... 91

— Judgment against one Co-Sharer, effect of, on Interest of other Co-Sharers—*Code of Civil Procedure (Act X of 1877), s. 13, expl. 5—Repeal, Effect of.* Explanation 5 to s. 13.

of the Code of Civil Procedure would not make a judgment obtained in a suit against one co-sharer binding on another co-sharer no party to such suit, in respect of the rights enjoyed in common by such co-sharers in their common property. Nor could such explanation be applied to a case instituted, or the judgment delivered in such case, during the time when the old Code of Civil Procedure was in force.

HAZIR GAZI v. SONAMONEE DASSEE ... 31

RES JUDICATA—*Prescriptive Right—Civil Procedure Code (Act X of 1877), s. 13, expl. 5.*] Explanation 5 of s. 13 of Act X of 1877 only applies to cases where several different persons claim an easement or other right under one common title, as for instance, where the inhabitants of a village claim by custom a right of pasturage over the same tract of land or to take water from the same spring or well.

Where therefore *A*, in defending a suit brought against him by *B*, to have it declared that he had a right to build a wall across a drain, set up a prescriptive right to use the drain, and it was decided that no such prescriptive right existed in *A*;

And, subsequently, *C* brought a suit against *B*, claiming to use the same drain as an easement, and asking for the removal of the wall in question in the former suit, and *B* set up the judgment in the suit between himself and *A*, as a bar to the suit,—

Held, that the right claimed by *C* not being one which he and other inhabitants of the neighbourhood claimed under one common title, but a prescriptive right which he claimed individually in respect of his own house and premises, and depending upon the length of time he had used the right, was a separate claim, and that the judgment in the suit between *B* and *A* did not operate as a bar to his suit.

KALISHUNKUR DOSS v. GOPAL CHENDER DUTT ... 49

Suit for Enhancement of Rent—Finding in Judgment not embodied in Decree—Civil Procedure Code (Act X of 1877), s. 13.] *N.* brought a suit against *P.* for enhancement of rent. *P.*'s defence was, *first*, that no notice of enhancement had been given; *secondly*, that the rent was not enhanceable, as he and his predecessors in title had held it at a fixed rent from the date of the Permanent Settlement. The suit was dismissed on the ground that no notice had been given; but the Munsif stated in his judgment, that he considered the rent enhanceable, because he did not believe in the genuineness of the documentary evidence produced by *P.* The decree merely ordered that the suit should be dismissed, the portion of the judgment as to the enhanceability of the rent not being embodied in the decree. *P.*, therefore, had no right of appeal against that portion of the judgment. In a subsequent suit by *N.* against *P.*, for enhancement of rent of the same tenure, *held*, that, on the rule laid down by the Privy Council in *Soorjee-monee Daye v. Suddanund Mohapatte* and *Krishna Behari Roy v. Bunwari Lall Roy*, *P.* was precluded, by the decision in the former suit, from denying that the rent of the tenure was enhanceable, although the decision on that point was not embodied in the decree.

The material findings in each case should be embodied in the decree, and if they are not, it is incumbent on the parties, to avoid their being bound by decisions against which they have no right of appeal, to apply to amend the decree in accordance with the judgment.

NIAMUT KHAN v. PHADU BULDIA ... 519

RES JUDICATA—Want of Jurisdiction as to Valuation of Suit—Subsequent Suit between the same Parties—Intervenors—Competent Court—Rent-Suits.] A judgment of a Court not competent to try the case in which the judgment is pleaded as *res judicata*, must, nevertheless, be held to be the judgment of a Court of competent jurisdiction within the rule as laid down in the maxim *nemo debet bis vexari pro eadem causa*, and s. 13 of Act X of 1877; more especially where the first suit is tried, decided, and affirmed on regular appeal by a Subordinate Judge, who would have been competent to decide the suit (had it been brought before him) in which the judgment was pleaded.

The rule of *res judicata* ought to be held to apply to judgments in rent-suits, at least until interventions in such suits are authoritatively prohibited.

Costs not allowed where the plea of *res judicata* was not raised until after all the evidence had been taken.

RUN BAHADOOR SINGH v. LUCHO KOOR 406

*Civil Procedure Code (Act VIII of 1859), ss. 2 and 7—Relinquishment—Suit to set aside Order releasing from Attachment Properties as to which a former Suit has been dismissed—Mortgage made during infructuous Attachment—Subsequent Attachment and Sale.] R, on the 30th December 1870, obtained an *ex parte* decree against D, in execution of which he attached properties X and Y on the 4th January 1871.*

D applied for a rehearing, which was granted; and on the 30th of December 1871, a decree was again passed against D, in execution of which the same properties were attached on the 9th of August 1872, and purchased at the execution-sale on the 1st August 1874 by R. On the 14th February 1871, D had executed a solehnama and mortgage in favor of G, pledging, among other properties, X and Y as security for a loan made to him by G. D having made default in payment, G obtained a decree against him in terms of the solehnama on the 28th February 1871. Subsequently, D granted another mortgage of the same properties in favor of G. G sold his decree and mortgage to the plaintiff, who in execution of the decree attached properties X and Y. In these execution-proceedings R brought forward the fact of his purchase of the same properties in August 1874, and his claim was allowed, and the properties X and Y released from attachment on the 4th March 1876. The plaintiffs had, on the 8th March 1872, obtained a mortgage from D, on which they had obtained a decree on the 28th September 1874, in execution of which they had attached X and Y; but on R claiming them under his purchase in August 1874, an order was made on the 10th April 1875 releasing X and Y from attachment; and in a suit by the plaintiff to set aside that order, they failed as to properties X and Y, on the ground that those properties were not included in the mortgage of March 1872. In a subsequent suit brought by the plaintiffs against R and D, to set aside the order of the 4th March 1876, and to have X and Y declared liable to be sold under the decree of the 28th February 1871,—*held*, that the suit was not barred under s. 2 of Act VIII of 1859 by the decree in the previous suit, nor was it barred by s. 7 of the same Act.

Held also, that the purchase by R in August 1874 was subject to the mortgage to G of the 14th February 1871.

RADHANATH KUNDU v. LAND MORTGAGE BANK OF INDIA, LIMITED 559

Civil Procedure Code (Act X of 1877), s. 13.] The plaintiff sued to recover certain lands, claiming them as a por-

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tion of A, and alleging that A was portion of a mouza which had been leased to him in patni by the zemindar. The suit was dismissed, on the ground that though A was known as a part of the plaintiff's mouza, yet it had been included in a patni lease of an adjoining mouza, which the zemindars had granted to the defendants previously to the date of the plaintiff's lease. The plaintiff brought a second suit claiming another portion of A on the same title.	
<i>Held</i> , that the claim was barred as <i>res judicata</i> .	
SUNDHYA MALA v. DABI CHURN DUTT	715
RES JUDICATA.	
See APPLICATION FOR EXECUTION OF DECREE. REPRESENTATIVE	203, 777
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REVIEW—New Trial—Mofussil Small Cause Court Act (XI of 1865), s. 21—Civil Procedure Code (Act X of 1877), s. 624.] A Judge of a Mofussil Small Cause Court has jurisdiction to direct a new trial of a case tried by his predecessor, s. 21 of Act XI of 1865 not having been repealed by the Civil Procedure Code, 1877.	
<i>Per</i> GARTH, C. J.—The Judge, however, in dealing with applications for new trial under s. 21, should have regard to the rule laid down in s. 624 of the Code of Civil Procedure.	
SHUMSHER ALLY v. KURKUT SHAH	236
————, APPEAL FROM ORDER ON APPLICATION FOR.	
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REVIVOR—Limitation Act (XV of 1877), sched. ii, art. 180—Execution of Decree—Civil Procedure Code (Act X of 1877), ss. 230, 245, 248—Scire facias, Writ of.] The plaintiff obtained a decree in 1864. The first application for execution was made in September 1869 under s. 216 of the Civil Procedure Code (Act VIII of 1859); and after notice to the defendant as provided thereby, an order was made under that section for execution to issue. In September 1880, an application for execution was made under s. 230 of the Civil Procedure Code of 1877, which repealed Act VIII of 1859.	
<i>Held</i> , that the order after notice had the effect of reviving the decree within the meaning of art. 180, sched. ii, Act XV of 1877, and therefore the decree was not barred by the law of limitation.	
An order for execution under the Code made after notice to show cause has, on the Original Side of the Court, the same effect	

as an award of execution in pursuance of a writ of *scire facias* had under the procedure of the Supreme Court,—i.e., it creates a revivor of the decree.

The clause of s. 230 of Act X of 1877, which prohibits a subsequent application for execution, only applies where the previous application has been made under that section, and not where such previous application has been made under Act VIII of 1859.

ASHOOTOSH DUTT v. DOORGA CHURN CHATTERJEE	504
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REVIVOR.

See REPRESENTATIVE	777
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REVOCATION OF PROBATE.

See PROBATE	429
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Removal of Mohunt claiming under a Will—Succession Act (X of 1865), s. 234.] By his will the mohunt of an *akra*, or religious endowment, appointed A to be the *malik* of the properties comprised in the endowment, and to receive the dues and pay the debts, and to do everything necessary connected therewith; and provided that, if any act was done prejudicial to any of those purposes or to any property set apart therefor, or contrary to the Hindu practice and religion or usages, the property should vest in such disciple of his who should be competent and virtuous. A obtained probate of the will, and entered upon the properties mentioned therein.

Held, that the Court had not power, under s. 234 of the Succession Act, to revoke the probate upon the ground that A had, since he took charge of the office, taken to an immoral course of conduct, and in consequence had been excluded from the community of *mohunts*.

The proper course to take for depriving such a person of his office would be to bring a suit under the Religious Endowment Act, or any other suit, for a declaration that he had disqualified himself, and if in that suit a decree was obtained and duly certified to the Court which granted probate, that Court would, no doubt, direct the revocation of the probate.

IN THE MATTER OF THE PETITION OF MOHUN DASS v. LUTCHMUN DASS	11
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RIGHT OF OCCUPANCY IN ASSAM—*Act X of 1859, s. 6—Government Ryot.]* A Government ryot can acquire a right of occupancy in respect of lands cultivated by him under the Rent Law in force in Assam.

KONARAM GAONBURAH v. DHATOARAM THAKOOR	...	196
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PRIVATE FERRY—*Easement—Limitation Act (IX of 1871), s. 27—User for Twenty Years.]* The right of establishing a private ferry and levying tolls is recognized in British India.

Per GARTH, C. J., and WHITE, J.—Twenty years is the shortest period within which such a right of ferry can be established by user.

Per MITTER, J.—Where the existence of a private right of ferry plying between the lands of A and B is admitted by B, no question of user arises; the issue that is raised between the parties is not whether a private ferry exists, but whether the *recognized* private ferry which is in existence is the property of A or B: but *semble*, supposing such question of user to arise, a right of private ferry cannot be established as an indefeasible right by long user.

PARNESHARI PROSHAD NARAIN SINGH v. MAHOMED STUD	...	608
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<i>See</i> CONTAGIOUS DISEASES ACT, ss. 11, 21	163
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<i>See</i> EXCISE	822
— BY SHERIFF IN EXECUTION OF DECREE— <i>Payments of Purchase-Money on agreement as to possession between Purchaser and Execution-Creditor—Sale subsequently set aside—Suit for Money had and received—Accord and Satisfaction—Novation—Limitation.</i> On the 9th of October 1866, the Sheriff of Calcutta executed a bill of sale to <i>A</i> of a certain taluk situated in Oudh, of which <i>A</i> afterwards obtained possession. In consequence of an impression that the sale was illegal, <i>A</i> directed the Sheriff not to pay the money to <i>B</i> , the execution-creditor, and the money remained in the hands of the Sheriff until the 24th of October 1867, when <i>A</i> directed the payment of the money to <i>B</i> , in consequence of an arrangement then come to between <i>A</i> and <i>B</i> , to the effect that, if <i>A</i> should be ousted from the possession of the property within a year, <i>B</i> should take measures to reinstate him at his (<i>B</i> 's) expense. <i>A</i> died without heirs in July 1868, and the Government of Oudh, not being aware that <i>A</i> had left a will, took possession of the taluk partly as on an escheat, and partly because there were arrears of revenue due on the property. On the 2nd of October 1868, an order was passed by the Collector of the district in which the taluk was situate, declaring the sale by the Sheriff illegal, and directing the return of the taluk to its former owners, which was done in April 1869. In a suit brought by <i>A</i> 's executors against <i>B</i> in September 1872 to recover the purchase-money, as money had and received, as upon a total failure of consideration,—	
<i>Held</i> , that the agreement of the 24th of October 1867 operated as an accord and satisfaction of all rights which <i>A</i> might have had to a return of the purchase-money or to damages, and that the only remedy which <i>A</i> had was an action on the agreement.	
<i>Held</i> also, that no breach of the agreement of 24th of October 1867 had in fact occurred, and that, even if the agreement had been broken, the suit was barred by limitation.	
DORAB ALLY KHAN <i>v.</i> ABDUL AZEED and ABDUL AZEED <i>v.</i> DORAB ALLY KHAN	356
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<i>See</i> ACT VIII OF 1859, s. 7	142

SALE IN EXECUTION—"Right, title, and interest" of a Judgment-Debtor in a partly-executed Decree—Possession of land attached under Reg. V of 1805, s. 26—Right of Purchaser.] A decree of the year 1843 awarded to persons, afterwards represented by the respondents, the possession of a moiety of a taluk, which had been since 1837, and remained till 1866, under attachment by the Collector in virtue of an order made under Reg. V of 1812. The Court which granted the decree, intending to execute it, approved the proceedings of an Amin purporting to put the decree-holders into constructive possession of a certain number of mouzas of the taluk.

In 1850, the appellants, in execution of a decree for money obtained by them against the respondents, purchased at a sale, amongst other things, their right, title, and interest in the decree of 1843. Held, that possession of the mouza having been delivered so far as it could be delivered, considering the attachment to which the taluk containing these mouzas was subject, the decree of 1843 had been so far executed; and that what was acquired by the appellants at the execution-sale was only the unexecuted portion of the decree of 1843.

GRISHCHUNDER CHUCKERBUTTY v. JIBANESWARI DEBIA and GRISHCHUNDER CHUCKERBUTTY v. BISWARI DEBIA ... 243

OF GOODS—Delivery at certain Date—Rescission of Contract—Vendor's Remedies—Time of Essence of Contract—Contract Act (IX of 1872), ss. 55, 107.] In a contract for the sale of ascertained goods, terms cash on delivery, to be given and taken in ten or eleven days, the vendee obtained an extension of the time for the performance of the contract, agreeing to pay godown rent and interest. He took delivery of, and paid for, some of the goods, and subsequently obtained a further extension of time. A small balance remained in the vendor's hands, after giving the vendee credit for the goods taken delivery of, godown rent, and interest. After the expiration of the further time, the vendee tendered the price of the remaining goods, and demanded delivery, when the vendors stated that they had rescinded the contract. In an action for damages for non-delivery,—held, that time was of the essence of the contract, and that, under s. 55 of the Contract Act, the vendors were entitled to rescind.

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OF GOVERNMENT REVENUE-PAYING LANDS—Purchaser's Liability.] Government revenue does not become due from day to day, but at certain specified times, according to the contract of the parties, or the custom of the district in which the lands liable to pay such revenue are situate. It is not, therefore, liable to apportionment; and the person who is the owner of a revenue-paying estate at a time when the payment of the revenue falls due, is the only person liable for its payment.

The purchaser of an estate which pays Government revenue, takes it subject to all revenue and cesses, whether in arrear or accruing.

Held therefore, in a suit by a purchaser for a certain sum for Government revenue and cesses, which became due after the date of, though due for a period previous to, his purchase, which sum he alleged he had been compelled to pay to save his interest in the subject of his purchase, that he was not entitled to recover.

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<hr/> TO PROSECUTION— <i>False Evidence—Criminal Procedure Code (Act X of 1872), s. 468—Jurisdiction to give Sanction—Case settled without Evidence—Duties of Judge—Prosecution for False Evidence on verified Petition. When such Verification is unnecessary.</i> [The Courts that have jurisdiction to grant a sanction to proceedings under s. 468 of Act X of 1872, are the Court before which the offence was alleged to have been committed, and the Courts to which such Court is subordinate.	
<i>Per</i> GARTH, C. J.—Where a case is settled without evidence being gone into, the Court in which the suit was brought, even if it have power to sanction criminal proceedings against any of the parties to such suit under s. 468 of Act X of 1872, is guilty of great impropriety and indiscretion in so doing, inasmuch as it can have had no opportunity of judging of the <i>bonâ fides</i> of the claim or defence.	
<i>Semle.</i> —A petition presented under Reg. XVII of 1806 not requiring verification, cannot, from the fact of its being verified, unnecessarily, be made the subject of a prosecution for giving false evidence.	
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SPECIFIC PERFORMANCE— <i>Evidence—Admissibility of Parol Evidence—Evidence Act (I of 1872), s. 92, provisoes 1 and 6—Practice—Joinder of Causes of Action—Civil Procedure Code (Act X of 1877), s. 44, rule (a)—Specific Relief Act, ss. 17, 22, 26.</i> The plaintiffs sued for specific performance of an agreement in writing which set forth, <i>inter alia</i> , that the defendants had agreed to sell, &c., under "certain conditions as agreed upon." The defendants alleged, that the written agreement did not contain the whole of the agreement between the parties, and offered parol evidence in support of their contention.	
<i>Held</i> (reversing the judgment of WILSON, J.), that the parol evidence was admissible to show what was meant by the clause "certain conditions as agreed upon."	
<i>Per</i> PONTIFEX, J. (GARTH, C. J., dissenting).—The evidence was admissible under proviso 1, s. 92 of the Evidence Act (I of 1872).	
Discussion as to the meaning of s. 92 of the Evidence Act, and of ss. 17, 22, and 26 of the Specific Relief Act.	
<i>Per</i> PONTIFEX, J.—It is of the essence of specific performance that part only of an agreement should not be performed.	
Part of the purchase-money had been advanced by the plaintiffs to the defendants, for which the defendants had given their promissory notes; and the plaint contained a prayer that the defendants be ordered to pay over the amount of the notes.	
<i>Held</i> (affirming the decision of WILSON, J.), that there was no misjoinder of causes of action within the meaning of s. 44, rule (a) of the Code of Civil Procedure (Act X of 1877).	
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—, *Registration Act (III of 1877), ss. 49 and 50—Oral Agreement, Evidence of—Effect of Oral Agreement as against subsequent Registered Conveyance.* A, by an oral agreement, agreed to grant two mokurari leases of certain properties upon certain terms to B, and thereupon executed two mokurari leases in favor of B, which were not however registered. Afterwards A granted two mokurari leases of the same mouzas, upon terms more favorable to himself, to C and D, who, at the time of such grant, had notice of A's previous agreement with B. *Held*, in a suit for specific performance brought by B against A, and to

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which <i>C</i> and <i>D</i> were added as defendants, that, notwithstanding the provisions of ss. 49 and 50 of Act III of 1877, <i>B</i> could obtain a decree for specific relief, and a declaration that the leases to <i>C</i> and <i>D</i> were void as against him.	
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Plea that certain of the Lands included in Notice are not enhanceable—Onus of Proof of such Fact—Notice of Enhancement. In suits for enhancement of rent, where the tenant pleads that a portion of the land sought to be enhanced is held by him rent-free, the onus is on the tenant to prove *primâ facie* that such portion of the land is so held by him; and if he be successful in this, the onus is then shifted upon the landlord to rebut such *primâ facie* evidence.

A notice for enhancement, otherwise sufficient, is not invalidated, because a portion of the lands claimed as enhanceable in such notice turns out to be rent-free land; but is good so far as it is applicable to the portion of the land which is liable to enhancement.

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Diluvion—Possession on Re-formation—Subsequent Diluvion—Possession—Limitation Act (IX of 1871), sched. ii, arts. 143, 145.] Per GARTH, C. J.—Where a person can show that he has been in possession of certain lands prior to such lands becoming diluviated, his possession must be considered as continuing during the time of diluvion, until such time as he becomes dispossessed by some other person; and in such a case, the onus lies upon the dispossessor to show that he has acquired a title under the law of limitation which has put an end to the rights of the original possessor.

Per WHITE, J.—The dispossession, or discontinuance of possession, mentioned in art. 143, sched. ii of Act IX of 1871 is that which occurs where the property is taken actual possession of by another, and does not apply to the case where the property is submerged by the act of God, and so made impossible of occupation and actual possession.

Owners of land, which has suffered from successive diluviations and re-formations, must, if they wish to preserve their rights, bring their suit within twelve years of the time when adverse possession is first taken of land re-forming on the original site, whether at the time of suit the land is capable of occupation or is lying under water in consequence of a second diluvion.

KALLY CHURN SAHOO v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL	725
RENT— <i>Splitting Claims—Code of Civil Procedure (Act X of 1877), s. 43.]</i> At the close of the Bengalee year 1283, which was on the 11th of April 1877, the defendant owed to the plaintiff,	

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his landlord, the rents of his holding for the years 1281, 1282, and 1283. The plaintiff, in the month of April 1878, before the close of the year 1284, instituted a suit for the rent for 1281 only, and obtained a decree. On the 10th of April 1879, he instituted another suit for recovery of the rents for the years 1282, 1283, and 1284. <i>Held</i> , that the claim for the years 1282 and 1283 was barred under s. 43 of the Code of Civil Procedure.	
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SURVEY PROCEEDINGS— <i>Beng. Act V of 1875, s. 45, cl. (b), and s. 62—Survey Proceedings not taken for public purposes—Right of Suit.</i> Section 45, cl. (b) of Beng. Act V of 1875 applies only to a survey or some similar proceeding taken by a revenue officer "for some public purpose," and against which any party who may be affected by the boundary laid down by such officer would have a right to object.	
Therefore, where such a proceeding, although initiated under Beng. Act V of 1875, has been taken for the purpose of settling the boundaries of private property as between the owners of it, the party aggrieved by the order of the Collector in such proceeding is not debarred by s. 62 of the Act from bringing a suit in the Civil Court to have the boundaries ascertained.	
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See LANDLORD AND TENANT ... 433

TRANSFER OF CRIMINAL CASE TO ANOTHER DISTRICT—

Criminal Procedure Code (X of 1872), s. 64—Grounds necessary to obtain Transfer when application is opposed by Accused.] Before the transfer of a case from one Criminal Court to another can be made, in cases in which the accused objects to the transfer, the prosecution must bring forward the very best evidence to prove that a fair trial cannot be had in the district in which the case is ordinarily triable.

IN THE MATTER OF THE PETITION OF THE LEGAL REMEMBRANCE.

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TRIAL OF SEPARATE CHARGES—*Charges, distinct and separate, tried simultaneously by a Jury—Parties opposed in rioting—Consent by Pleaders on behalf of Accused to irregular Procedure—Examination of Accused.]* Members of two opposing parties in a riot were, under two distinct committals, sent up for trial before the Sessions Judge and a jury. After the close of the case for the prosecution in one of these cases, the Sessions Judge, with the consent of the pleaders representing the accused, postponed the taking of the evidence for the defence, and proceeded to examine the witnesses for the prosecution in the counter-case before the same jury. The Court then took the evidence of the witnesses for the defence in the first, and in the counter-case in the order named, and after hearing the address of the various pleaders for the defence and the reply of the Government Pleader, proceeded to sum up the facts in both cases to the jury, who returned a verdict in respect of all the accused. *Held*, that the procedure resorted to by the Judge was a practical violation of the salutary rule which necessitated the keeping of trials in such cases distinctly separate, and that its adoption having materially prejudiced the interests of the accused, the convictions should be set aside.

Held further, that the defect in the procedure could not be cured by the consent of the pleaders for the defence to the arrangement suggested by the Court.

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<i>See BREACH OF TRUST</i>	70
UNDER-PROPRIETARY RIGHT IN OUDH— <i>Settlement Circular Order, 29th January 1861—Oudh Sub-Settlement Act (XXVI of 1866)—Birt Sankalp and Khushust Sankalp—Limitation.</i>] A provision in the Chief Commissioner's Circular Order of 29th January 1861 in effect declares, that, to found a claim to a birt tenure in Oudh, possession must be shown to have existed in 1855, the year before annexation. This was assumed, for the purposes of this decision, to have had the force of law at the time when the Financial Commissioner ruled, in Circular Orders 5 and 6 of 5th June 1868, that "a claimant who cannot prove possession of his sankalp holding in 1262-63 Fasli (1854-55) has no <i>locus standi</i> in Court." Whether rightly treated by the Oudh Courts as an enactment of limitation, or rather to be considered as a disability affecting title, this provision was repealed by the effect of Acts XVI, of 1865, s. 5, and XIII of 1866, s. 1; the suit of a birtiah becoming thereupon cognizable, notwithstanding that he might not have been in possession in 1855.	
The words of limitation in the Circular Order apply to all birt tenures, including those that are termed sankalp, when the latter are in the nature of birts.	
Rules I and II in the schedule of the Oudh Sub-Settlement Act, XXVI of 1866, held not to exclude the plaintiff, he having shown that he, and those through whom he claimed, did not, in the words of those rules, hold the land "through privilege, or by favor of 'the talukdar,' but held by an under-proprietary right, under contract 'pucka,' with some degree of continuousness, since the village came into the taluka."	
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<i>See PARTIES</i>	827
UNLAWFUL ASSEMBLY.	
<i>See CULPABLE HOMICIDE</i>	154
USER— <i>Limitation Act (IX of 1871), ss. 24, 27, sched. ii, art. 31, part v—Presumption of Title founded on long continued User—Easement—Obstructing a Watercourse—Continuing Act of Wrong.</i>] More than twenty years, and possibly fifty or sixty, before suit, the plaintiff's ancestors and predecessors in estate had constructed and used a <i>pāin</i> , or artificial watercourse, on the defendants' land, making compensation to them. The <i>pāin</i> , by a channel at one part of its course, contributed to the water in a <i>tdl</i> , or reservoir, belonging to the defendants; and by a channel at another part, took the water which overflowed from the <i>tdl</i> , after the defendants had used as much of the water therein as they required. Less than twenty years before the suit, the defendants, without authority, obstructed the flow of water along the <i>pāin</i> in several places. The Courts below differed as to whether some of these obstructions had not been made more than two years before the suit, the rest having been made within that period.	
Held, that the provisions of Act IX of 1871, a remedial Act, and neither prohibitory nor exhaustive, did not exclude, or interfere with, the acquirement of rights otherwise than under them. A title might be acquired under that Act by a person having no other right at all; but it did not exclude, or interfere with, other titles	

and modes of acquiring easements. And s. 27, by allowing a user of twenty years, if exercised until within two years of suit, under the conditions prescribed, to give, without more, a title, did not prevent proof of an easement founded on another title independently of the Act. Such a long enjoyment as the plaintiff had proved should be referred to a legal origin, and the long user of the *padm* and of the superfluous water of the *id*, afforded evidence giving rise to a presumption that a grant, or an agreement, had been made creating an easement. Although, on the assumption that some of the obstructions in question had existed for more than two years before the suit, the plaintiff might not have shown a right under Act IX of 1871, s. 27, yet he did not require its aid.

Held also, that such obstructions being continuous acts, as to which the cause of action accrued *de die in diem*, Act IX of 1871, sched. ii, part v, cl. 31, fixing two years from the date of the obstruction as the period of limitation "for obstructing a water-course," did not preclude a suit complaining of obstructions though made more than two years preceding the date of the commencement of the suit.

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WITNESSES— <i>Duty of Committing Magistrate—Examination on Oath</i> — <i>Statements of Witnesses.</i>] The Magistrate to whom a complaint was made, examined certain persons on oath in the absence of the accused, merely for the purpose of ascertaining whether there was any, and what, case against the prisoners; and he did not take down in writing the statements of the persons so examined. <i>Held</i> , that the Magistrate was wrong in examining the witnesses on oath in the absence of the accused, or for the purpose of finding out whether there was a case; but that, having done so, he was not bound to take down their statements in writing.	
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